LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 19 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-737

ARKANSAS LOUISIANA GAS COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION
ARKANSAS POWER & LIGHT COMPANY
CITIES SERVICE GAS COMPANY
GENERAL MOTORS CORPORATION
LACLEDE GAS COMPANY
MISSISSIPPI RIVER TRANSMISSION CORPORATION
REYNOLDS METALS COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REUBEN GOLDBERG
Goldberg, Fieldman & Hjelmfelt
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

ROBERT ROBERTS, JR.
GILBERT L. HETHERWICK
Blanchard, Walker, O'Quin
& Roberts
First National Bank Building
Post Office Drawer 1126
Shreveport, Louisiana 71102

Attorneys for Petitioner, Arkansas Louisiana Gas Company

November 19, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	3
Reasons for Granting the Writ	8
Conclusion	14
Appendices:	
A. Opinion of the court of appeals	1a
B. Judgment of the court of appeals	28a
C. Opinion No. 643 Issued by the Federal Power Commission	30a
D. Opinion No. 643A Issued by the Federal Power Commission	54a
E. Opinion No. 643B Issued by the Federal Power Commission	66a
F. Excerpts from Natural Gas Act	75a

CITATIONS

Court Cases: Page

FPC v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) 10, 12
FPC v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498 (1949) 12
FPC v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) 12-13
Panhandle Eastern Pipeline Co. v. *FPC*, 204 F.2d 675 (CA3, 1953) 12
Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 10, 11
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) 10, 11

Commission Cases:

Carolina Pipeline Co. v. *Southern Natural Gas Co.*, 31 FPC 705 (1964) 11
Continental Oil Co., 32 FPC 1487 (1964) 12
Edwin L. Cox, 33 FPC 1301 (1964) 12
W. W. Harvey, 31 FPC 880 (1964) 12
Otter Tail Power Co., 2 FPC 134 (1940) 11
Sunray DX Oil Co., 29 FPC 1295 (1963) 12
Sunray Mid-Continent Oil Co., 20 FPC 824 (1958) 12
Texas Eastern Transmission Corp., 42 FPC 376 (1969) 12
Wisconsin Michigan Power Co., 31 FPC 1445 (1964) 11

Statutes:

Natural Gas Act (15 U.S.C. 717, *et seq.*)

Section 4 (15 U.S.C. 717c) 2, 4, 10, 11, 12, 14
Section 4(b) (15 U.S.C. 717c(b)) 10, 11
Section 4(e) (15 U.S.C. 717c(e)) 5
Section 5 (15 U.S.C. 717d) 2, 4, 11, 14
Section 7 (15 U.S.C. 717f) 2, 12
Section 7(c) (15 U.S.C. 717f(c)) 12
Section 19(b) (15 U.S.C. 717r(b)) 2

Miscellaneous:

Order No. 431, 45 FPC 570 4
Order No. 533, 40 Fed. Reg. 41760 ..... 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. ———

ARKANSAS LOUISIANA GAS COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION
ARKANSAS POWER & LIGHT COMPANY
CITIES SERVICE GAS COMPANY
GENERAL MOTORS CORPORATION
LACLEDE GAS COMPANY
MISSISSIPPI RIVER TRANSMISSION CORPORATION
REYNOLDS METALS COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Arkansas Louisiana Gas Company ("Arkla") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in "*Arkansas Power & Light Company, et al.* v. *Federal Power Commission, et al.*, Nos. 73-1637, et al." entered August 21, 1975.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 1a to 27a) is reported at 517 F. 2d 1223.

The opinions of the Federal Power Commission ("Commission") (Nos. 643, 643A, and 643B) and accompanying orders, issued, respectively, on January 8, 1973, April 10, 1973, and June 8, 1973, are not yet reported. Opinion No. 643 and order appear at Appendix C, *infra*, pp. 30a to 53a; Opinion No. 643A and order appear at Appendix D, *infra*, pp. 54a to 65a; and Opinion No. 643B and order appear at Appendix E, *infra*, pp. 66a to 74a.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, pp. 28a to 29a) was entered August 21, 1975. Arkla invokes the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C., Section 717r(b).

QUESTION PRESENTED

In the exercise of its authority with respect to curtailment plans governing deliveries of natural gas during a period of gas shortage by a natural gas company subject to the Commission's jurisdiction under the Natural Gas Act, may the Commission lawfully impose an obligation on the natural gas company to sell and deliver natural gas where the contract, approved and certificated by the Commission, is a seller's option contract which admittedly imposes no obligation on the natural gas company to sell any gas, even in times when gas supplies are sufficient, and neither creates a right to gas in, nor imposes an obligation on, the other party to the contract to purchase the gas that the natural gas company in the exercise of its option may elect to offer for sale.

STATUTE INVOLVED

Sections 4, 5 and 7 of the Natural Gas Act, 15 U.S.C. 717c, 717d, and 717f, are set forth in Appendix F, *infra*, pp. 75a to 80a.

STATEMENT

The Petitioner—Petitioner, Arkla, an integrated gas utility,[1] operates a natural gas system in six states.[2]

Arkla's operations, as the Commission acknowledged (Appendix E, *infra*, pp. 66a to 67a), differ markedly from those of the typical natural gas pipeline company regulated by the Commission under the Natural Gas Act ("Act"). The typical pipeline company is not engaged in the retail distribution of natural gas; it transports gas in interstate commerce from producing areas to markets where it sells the gas to distributors for resale at relatively few delivery points, usually at a meter station located at a town border or city gate (Appendix C, *infra*, p. 31a; Appendix E, *infra*, p. 67a).

Arkla's principal business is the distribution of gas at retail subject to regulation by state regulatory commissions.[3] Arkla makes only a handful of sales for resale which are subject to the Commission's rate jurisdiction: a firm sale for resale to Cities Service Gas Company in Southern Missouri, and firm sales for resale to five very small distribution customers on the Oklahoma-Kansas "Main Line" System (Appendix C, *infra*, p. 31a), under contracts which obligate Arkla to sell and obligate the customers to purchase specified volumes of gas. Additionally, Arkla has a contract to sell at its option natural gas for resale to Mississippi River Transmission Corpora-

---

[1] Arkla is engaged in the production, purchase, gathering, processing, purification, transportation, distribution, and sale of natural gas (Appendix C, *infra*, p. 31a).

[2] Arkansas, North Louisiana, East Texas, Oklahoma, and South Kansas, with one sale in Southern Missouri (Appendix C, *infra*, p. 31a).

[3] At the close of 1972, Arkla was directly serving 557,117 residential customers, 62,055 commercial customers, and 3,060 industrial customers from its main transmission lines and from distribution systems located in about 500 communities.

tion ("MRT"). The contract imposes no obligation upon Arkla to sell and no obligation on MRT to buy any volume of natural gas (R 11-12, 30;[4] Appendix C, *infra*, pp. 40a to 42a).[5]

Proceedings before the Commission—On April 15, 1971, the Commission issued Order No. 431, 45 FPC 570, directing "that jurisdictional pipeline companies shall take all steps necessary for the protection of as reliable and adequate service as present supplies and capacities will permit—including adequate injection into storage in anticipation of the heating season" and requiring them, if curtailment of gas deliveries will be necessary because of inadequate supply of natural gas, to "file a tariff sheet, pursuant to Sections 4 and 5 of the Act and the Commission's regulations thereunder, setting forth a curtailment plan to effectuate the instant policy . . . ."

On May 15, 1971, in response to Order No. 431, Arkla filed tariff sheets (Original Sheets No. 3A, 3B, and 3C to Arkla's FPC Gas Tariff, First Revised Volume No. 1) setting forth its gas curtailment plan to conserve gas on its natural gas systems and during periods of gas shortage to protect service to its human needs customers, such as residences, hospitals, and schools (R 136-139).

Arkla classified (R 136-139) sales of natural gas into five priority categories: Categories I, A, B, C, and D,

---

[4] Unless otherwise noted, record references are to the printed Joint Appendix filed in the court of appeals.

[5] The court of appeals stated that "the Arkla-MRT contract provides for what might be considered the *most* interruptible type of service, since under other types of interruptible contracts there is an explicit commitment to sell gas when it is available." (Appendix A, *infra*, p. 13a, note 21; italics the court's) In truth, MRT does not have a gas supply contract. It has only a "contract" that sets forth the basis on which gas will be sold, if, as and when Arkla is agreeable to selling gas, and MRT is agreeable to buying gas. The "contract" was entered into by the parties years ago when the Arkla system experienced periods of over-supply.

subject to curtailment in that order, deliveries of natural gas in Category I having the lowest priority and those in Category D having the highest priority.

Category I applied to deliveries of natural gas under contracts which imposed no obligation on Arkla to sell any gas, i.e., to sell only gas as Arkla may be agreeable to selling and buyer may be agreeable to buying. Category A applied to large users of gas for boiler fuel and to other users where alternate fuels can be substituted, whether or not alternate fuel facilities are actually installed. Category B applied to large users of gas for fuel or raw material where an alternate fuel cannot be used. Category C applied to deliveries of gas to small industrial and regular commercial loads and for use as pilot lights or in accessory or auxiliary equipment to avoid damage to plants. The highest priority, Category D, applied to deliveries of natural gas to human needs customers. (Appendix C, *infra*, pp. 31a to 32a.)

Deliveries to MRT were in Category I, the lowest priority. Under the curtailments being experienced on Arkla's systems MRT would receive no gas from Arkla.[6]

The tariff sheets were suspended and their use was deferred to October 15, 1971, at which time they became effective upon motion of Arkla as provided under the Act[7] (Appendix A, *infra*, p. 4a). Hearings on Arkla's plan commenced on July 31, 1971 and concluded on August 6, 1971. The Administrative Law Judge, by Initial

---

[6] When natural gas was not in short supply, deliveries of natural gas by Arkla to MRT were not a significant part of MRT's total gas supply. Arkla's deliveries to MRT represented a mere 2½ percent of MRT's total gas supply (R 82).

[7] Section 4(e) of the Act provides that upon expiration of the suspension period, if the proceedings have not been concluded, the tariff sheets may be made effective by the filing of a motion to make them effective. With the filing of such a motion, the tariff sheets are automatically effective at the end of the suspension period.

Decision issued October 13, 1971, "held for naught" and "cancelled and rejected" the tariff sheets setting forth Arkla's curtailment plan, "without prejudice" to the filing of "a new and lawful tariff" by Arkla. The Administrative Law Judge held that Arkla had no immediately critical gas supply situation. (R 175-199; Appendix C, *infra*, p. 31a)

On exceptions to the Administrative Law Judge's decision, the Commission, on January 8, 1973, disagreed with, and reversed, the Administrative Law Judge. The Commission found that Arkla has an immediately critical gas supply situation and that a "curtailment plan is necessary"; prescribed a revised curtailment plan to be effective upon acceptance by the Commission of revised tariff sheets; and found "that curtailments heretofore effected, and those which will ensue until the revised tariff sheets we here require become effective, have been and will be undertaken pursuant to lawful provisions which are just and reasonable" (Appendix C, *infra*, pp. 30a to 53a).

The Commission-prescribed revised curtailment plan consisted of nine priorities, from the highest to the lowest priorities, as follows:

(1) Residential, small commercial (less than 50 Mcf on a peak day).

(2) Large commercial requirements (50 Mcf or more on a peak day), firm industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements.

(3) All industrial requirements not specified in (2), (4), (5), (6), (7), (8), or (9).

(4) Firm industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(5) Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler fuel use where alternate fuel capabilities can meet such requirements.

(6) Interruptible requirements of more than 300 Mcf per day, but less than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(7) Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day), where alternate fuel capabilities can meet such requirements.

(8) Interruptible requirements of more than 3,000 Mcf per day, but less than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.

(9) Interruptible requirements of more than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.[8]

With respect to the question of MRT's entitlement to gas deliveries from Arkla during periods of curtailment, the Commission ruled that the absence of an obligation on the part of Arkla to sell and deliver any gas to MRT under their contract would be disregarded and Arkla would be required to deliver natural gas to MRT on the basis of the end uses of gas by MRT's customers (Appendix C, *infra*, pp. 40a to 42a; Appendix D, *infra*, pp. 58a to 59a; Appendix E, *infra*, p. 71a).

---

[8] The Commission describes its plan as an end use plan, meaning that classification in priorities and, accordingly, curtailment, depends on the end use of the gas. As can be observed, however, end use is only one of the criteria involved. The classification based on the firm-interruptible dichotomy is based on contractual arrangements. Other criteria that determine classification are the volume of gas purchased, alternative fuel capability, and the class of user, i.e., residential, commercial, or industrial.

In Opinion No. 643A, issued April 10, 1973 (Appendix D, *infra*, pp. 54a to 65a), on consideration of applications for rehearing, the Commission modified the curtailment plan prescribed in Opinion No. 643. In Opinion No. 643B, issued June 8, 1973 (Appendix E, *infra*, pp. 66a to 74a), the Commission denied Arkla's application for rehearing of the Commission's ruling respecting deliveries to MRT during curtailment periods.

Proceedings in the Court of Appeals—Following denial of Arkla's application for rehearing, Arkla filed a timely petition for review of that ruling.[9]

The court of appeals held the Commission's orders deficient in several respects and remanded them for further consideration by the Commission. But, on the matter of deliveries of gas by Arkla to MRT, although acknowledging the non-existence of a contractual obligation on Arkla to sell gas to MRT (Appendix A, *infra*, pp. 12a to 13a), the court of appeals sustained the Commission's ruling that MRT might receive gas from Arkla based on the needs and end use priorities of its customers vis-a-vis the needs and end use priorities of Arkla's other customers.

REASONS FOR GRANTING THE WRIT

1. The natural gas shortage has affected, with few exceptions, all the natural gas pipeline companies subject to the Commission's jurisdiction. They are unable to deliver sufficient volumes of natural gas to their customers to meet their contractual undertakings. The Commission recently noted (Order No. 533, issued August 28, 1975, 40 F.R. 41760 (9/9/75) that natural gas pipeline companies subject to its jurisdiction "are experiencing such severe supply shortages that their direct and

[9] Arkla's application for rehearing and petition for review in the court of appeals challenged other rulings of the Commission that are not involved in the present petition.

indirect customers who use natural gas for high priority end uses . . . may be, or already are, subject to curtailment" (Order No. 533, *supra*, 40 F.R. 41760, footnotes omitted). Arkla anticipates that its shortfall of gas supply, assuming a normally cold winter, will require the complete cut-off this winter of deliveries of gas to Priorities 6 through 9; Priority 5 will be curtailed 100 percent in the four coldest months of the winter (December through March) and about 86 percent in November; Priority 4 will be curtailed on some days; and curtailments will reach into Priority 2 on some days. Only Priority 1, residential and small commercial users, will receive full deliveries at all times.

The Commission's calendar is clogged with protracted and complex curtailment proceedings in which the natural gas pipeline companies and their customers, Administrative Law Judges, and the Commission struggle to establish curtailment plans that fairly and equitably allocate the shortfall of natural gas.

A constantly recurring question in the curtailment proceedings is the question presented by the present petition for a writ of certiorari: does the Commission's power and authority under the Act in prescribing or approving curtailment plans include the power to override contractual obligations, and to impose obligations to deliver gas where none heretofore existed.

The question is an important and fundamental one in the administration of the Act. It has not been addressed by this Court. It demands resolution at the highest judicial level. Authoritative judicial resolution of the question could have a salutary effect on the curtailment proceedings before the Commission by speeding their conclusion and could reduce court litigation spawned by the curtailment proceedings.

2. The Commission, with approval of the court of appeals (Appendix A, *infra*, pp. 15a to 17a), has relied

on Section 4 of the Act to override contractual obligations with respect to the delivery of natural gas and to impose an obligation to deliver natural gas, which admittedly did not theretofore exist, based on the end use of the natural gas (Appendix C, *infra*, pp. 40a to 42a; Appendix D, *infra*, pp. 58a to 59a; Appendix E, *infra*, p. 71a).

In *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court held that the "substantive standard governing FPC evaluation of curtailment plans is found in § 4(b) of the Act," [10] but the Court did not hold that the Commission may abrogate a contract it approved and a service it certificated (which impose no gas delivery obligation), and in their stead impose a service obligation which radically alters the fundamental character of the contract and certificate.

In fact, no question of the scope of the Commission's authority under Section 4 in dealing with curtailments was before this Court in *Louisiana Power & Light Co.*, *supra*. The question presented in that case was one of the Commission's jurisdiction to reach sales that are not subject to its ratemaking jurisdiction under the Act in effecting orderly curtailment plans. 406 U.S. at 623, 631.

Nor do *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), support the Commission-asserted claim of authority under Section 4 to abrogate contracts, to nullify certificates, and to impose fun-

---

[10] The "substantive standards" of Section 4(b) of the Act prohibit the making or granting by natural gas companies of "any undue preference or advantage to any person" or subjecting any person to "any undue prejudice or disadvantage", or maintaining "any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

damentally different service obligations. While this Court in *Mobile* (350 U.S. at 334) and *Permian* (390 U.S. at 784) did rule that in exercising its *rate setting* powers under Section 4, the Commission may modify contracts to bring them within the rate standards of the Act (see Sections 4 and 5), the Court was there dealing with Commission orders fixing new and superseding *rates* and *charges without abrogation or modification of the character of the service rendered.*

The Commission did not here modify a contract to eliminate an "undue preference or advantage", an "undue prejudice or disadvantage", or an "unreasonable difference" in service between "localities or as between classes of service".[11] What the Commission did here was to abrogate the seller's option service to MRT (the most inferior of interruptible services) and require Arkla to furnish firm service to MRT, thereby radically altering the fundamental character of service Arkla was certificated to provide to MRT.

To modify rate provisions of a contract in the exercise of the Commission's rate setting authority within the framework of the service provided by the contract

---

[11] Indeed, the Commission did not hold that the contract it had approved and service it had certificated between Arkla and MRT violated these standards of Section 4(b). Nor could the Commission so find. In *Carolina Pipeline Co.* v. *Southern Natural Gas Co.*, 31 FPC 705, 708 (1964), the Commission ruled that the allocation of excess gas available on Southern Natural's System between two different classes of customers was neither unreasonable nor illegally discriminatory:

> The distinction between Atlanta and Carolina is the same as between a firm and interruptible customer. *Different treatment is not only proper but is expected.* [italics supplied]

In *Otter Tail Power Co.*, 2 FPC 134 (1940), construing Section 205 (b) of the Federal Power Act (the companion provision in the Natural Gas Act is Section 4(b)), the Commission ruled that the prohibitions of Section 205(b) relate only to discrimination *between customers of the same class.* To the same effect see *Wisconsin Michigan Power Co.*, 31 FPC 1445, 1450-1451 (1964).

and certificate is a far cry from modification of service obligations of the contract and certificate which radically alters the service to be provided. The former is clearly within the authority of the Commission; the latter is not.

3. "Curtailment regulations are not *rate setting* regulations but regulations of the 'transportation' of natural gas." *Louisiana Power & Light Co., supra*, 406 U.S. at 638; italics the court's. Since the exercise by the Commission of its transportation authority involves the exercise of powers granted to the Commission by Section 7 of the Act, the scope of the Commission's authority under Section 4 in a curtailment proceeding must consider and be reconciled with the limitations of Section 7. *Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F. 2d 675, 679-680 (CA 3, 1953).[12]

Section 7(c) of the Act requires natural gas companies to obtain a certificate of public convenience and necessity before making interstate sales of natural gas. The Commission cannot require a natural gas company to seek a certificate, and it cannot force acceptance of the certificate if the applicant does not like the proffered terms. *W. W. Harvey*, 31 FPC 880, 881 (1964); *Edwin L. Cox*, 33 FPC 1301 (1964); *Continental Oil Co.*, 32 FPC 1487, 1488 (1964); *Sunray Mid-Continent Oil Co.*, 20 FPC 824, 834 (1958); *Sunray DX Oil Co.*, 29 FPC 1295, 1297 (1963); *Texas Eastern Transmission Corp.*, 42 FPC 376, 386 (1969).

As this Court put it in *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 17 (1961):

> It must be realized that the Commission's powers under § 7 are, by definition limited. [citation omitted] The Commission cannot order a natural gas company

[12] All sections of the Act must be read together and reconciled so as to produce a symmetrical whole. *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949).

> to sell gas to users that it favors; [footnote omitted] it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification.

When Arkla applied for a certificate of public convenience and necessity in 1965 to deliver natural gas to MRT only when Arkla was willing to sell gas to MRT, if the Commission at that time had conditioned the grant of the certificate to require Arkla to render service to MRT on a different basis, Arkla would then have been free to accept or reject the certificate. The Commission attached no such condition. It granted the certificate as applied for and the certificate as granted was accepted by Arkla. Arkla filed its contract with MRT as the governing rate schedule, and it was accepted as such by the Commission.

In fact, had the Commission conditioned the grant of the certificate to impose an obligation to deliver specific volumes of natural gas to MRT, as it now has done in this case, Arkla could have rejected the certificate as it was free to do. Arkla was unwilling to commit any of its system supply to MRT except on the basis that gas was deliverable to MRT solely at Arkla's option (R 278), because Arkla's only need was to dispose of temporary excess supply of natural gas.

The result of the Commission's ruling is to deprive Arkla of that right of rejection and in the incongruous context of a shortage of gas supply to require Arkla to assume an obligation to MRT (1) that Arkla deliberately avoided in its contract, (2) that is at odds with the certificated service and rate schedule, and (3) that the Commission could not impose in times of gas plenty.

In short, although the Commission is clearly empowered by the Act to allocate scarce gas resources and, *argu-*

endo,[13] to adopt end use as a criterion to carry out its authority, the Commission may apply that end use criterion only within the framework of service obligations approved and certificated by the Commission and within the framework of the authority conferred by the Act. The adoption of an end use criterion does not enlarge the Commission's authority nor make distinctions in service obligations illegal under the standards of Sections 4 and 5 of the Act which were not illegal under those standards when certificated.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

REUBEN GOLDBERG
Goldberg, Fieldman & Hjelmfelt
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

ROBERT ROBERTS, JR.
GILBERT L. HETHERWICK
Blanchard, Walker, O'Quin
& Roberts
First National Bank Building
Post Office Drawer 1126
Shreveport, Louisiana 71102

Attorneys for Petitioner, Arkansas Louisiana Gas Company

November 19, 1975

---

[13] Arkla reserves the right to argue that end use as a criterion in curtailment plans is unlawful.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 73-1637, 73-1655, 73-1717 and 73-1800

ARKANSAS POWER & LIGHT COMPANY, GENERAL MOTORS CORPORATION and ARKANSAS LOUISIANA GAS COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

REYNOLDS METALS COMPANY, ARKANSAS LOUISIANA GAS COMPANY, GENERAL MOTORS CORPORATION, CITIES SERVICE GAS COMPANY, ARKANSAS POWER & LIGHT COMPANY, MISSISSIPPI RIVER TRANSMISSION CORPORATION, LACLEDE GAS COMPANY,
Intervenors.

Argued Dec. 13, 1974

Decided Aug. 21, 1975

ON PETITIONS TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

Peyton G. Bowman, III, Washington, D. C., with whom Richard M. Merriman, Washington, D. C., was on the brief, for petitioner in Nos. 73-1637 and 73-1717.

Edward J. Grenier, Jr., New York City, with whom Richard P. Noland and Richard J. Pierce, Jr., Washington, D. C., were on the brief, for petitioner in No. 73-

1655 and intervenor General Motors Corp. Ronald L. Winkler, Washington, D. C., also entered an appearance for petitioner in No. 73-1655.

Reuben Goldberg, Washington, D. C., with whom David C. Hjelmfelt and Sherman S. Poland, Washington, D. C., were on the brief, for petitioner in No. 73-1800 and intervenor Arkansas Louisiana Gas Co.

John H. Burnes, Jr., Atty., F. P. C., with whom Leo E. Forquer, Gen. Counsel, and George W. McHenry, Jr., Sol., F. P. C., were on the brief, for respondent.

William W. Bedwell, Washington, D. C., and John J. Mullally, Brooklyn, N. Y., were on the brief, for intervenor Mississippi River Transmission Corp.

Philip R. Ehrenkranz, Washington, D. C., entered an appearance for intervenor Reynolds Metals Co.

Daniel R. Hopkins, Oklahoma City, Okl., and Harry S. Littman, Washington, D. C., entered appearances for intervenor Cities Service Gas Co.

J. David Mann, Jr., Washington, D. C., entered an appearance for intervenor Laclede Gas Co.

Before MOORE,* *Senior Circuit Judge* for the Second Circuit, and MACKINNON and ROBB, *Circuit Judges.*

Opinion for the court filed by *Senior Circuit Judge* MOORE.

MOORE, *Senior Circuit Judge*:

[1] This is a consolidated proceeding to review Opinion Nos. 643, 643-A and 643-B and accompanying orders of the Federal Power Commission.[1] These opinions, issued pursuant to the Commission's authority under sections

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] 49 FPC 53, 907, 1316 (1973).

4[2] and 5[3] of the Natural Gas Act to regulate plans for the curtailment of natural gas,[4] dealt with a plan filed by the Arkansas Louisiana Gas Company. The opinions represent a portion of the Commission's efforts to cope with the apparently still-worsening[5] natural gas shortage. Three companies have petitioned for review: Arkansas Louisiana Gas Company (Arkla), Arkansas Power & Light Company (AP&L), and General Motors Corporation (GM).[6] Each of these parties, along with several other interested companies, has also intervened with respect to the petitions brought by the other petitioners.

Arkla is an integrated gas utility engaged in the production, transportation, distribution, and sale of natural gas. Its operations embrace six different states. Unlike most other natural gas pipeline companies, Arkla distributes the majority of its gas at retail, although a limited amount of pipeline sales are made to other gas companies for resale. In 1971, the FPC issued Order No. 431,[7] a Statement of General Policy directing that gas pipeline companies take steps to provide as adequate service as supplies and capacities would permit, and, where curtailment of deliveries would be required because of

---

[2] 15 U.S.C. § 717c (1970).

[3] 15 U.S.C. § 717d (1970).

[4] The Supreme Court upheld the FPC's authority to regulate natural gas curtailment plans in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972).

[5] N.Y. Times, Jan. 5, 1975, p. 1, col. 3; N.Y. Times, Feb. 23, 1975, § 3, p. 3, col. 1.

[6] GM purchases gas for some of its plants from two natural gas pipeline companies, which in turn purchase gas from Arkla and are affected by Arkla's curtailment plan. GM is therefore "aggrieved" within the meaning of section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), and is entitled to seek review of these orders. *See Cincinnati Gas & Electric Co.* v. *FPC*, 101 U.S.App.D.C. 1, 246 F.2d 688 (1957).

[7] 45 FPC 570 (1971).

inadequate supplies, to file a tariff sheet containing measures to deal with the shortage. In response to Order No. 431, Arkla filed a tariff setting forth its curtailment plan. The plan classified Arkla's sales of natural gas into five priority categories: Categories I, A, B, C, and D (listed in order of lowest to highest priority). Sales in Category I (sales subject to interruption at Arkla's sole discretion) had the lowest priority, and sales in Category D (sales to schools, churces, residences, hospitals, and other human needs customers) had the highest. Categories A, B, and C included different types of industrial customers categorized mainly according to the use made of the gas and the ability to utilize alternate fuels.[8]

By FPC orders the Arkla tariff sheets were temporarily suspended and their use deferred.[9] Hearings on the Arkla plan commenced on July 13, 1971, and on October 13, 1971, the Administrative Law Judge held that Arkla had no immediately critical gas situation and cancelled the tariff sheet. However, in Opinion No. 643, issued on January 8, 1973, the FPC disagreed and

---

[8] The Commission described Arkla's proposed curtailment plan as follows:

> The plan faces (*sic*) Arkla's sales in several categories interruptible in the following order: Category I, sales which are subject to interruption at seller's discretion under contracts or tariffs which provide in effect for the sale of such gas as seller may be agreeable to selling and buyer may be agreeable to buying; Category A, large users of gas for boiler fuel or other users where alternate fuels can be used, not determined by whether a user has actually installed alternate fuel facilities; Category B, large users for fuel or raw material where an alternate cannot be used; Category C, deliveries to small industrials and regular commercial loads and for use as pilot lights or in accessory equipment to avoid damage to plants; Category D, deliveries for schools, churches, residentials, hospitals and other human needs customers.

49 FPC at 55-56.

[9] By Arkla's motion made pursuant to section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e), the original tariff sheets became effective on October 15, 1971.

reversed the Administrative Law Judge. The Commission found that curtailment was necessary, held that with some modifications Arkla's curtailment plan was just and reasonable, and prescribed a somewhat revised eight-priority curtailment plan, to become effective upon receipt and acceptance by the FPC of revised tariff sheets submitted by Arkla. Certain parties (including GM, which sought and received leave to intervene at this point in the proceedings) then filed petitions for rehearing, which were granted by the Commission for purposes of further consideration. On April 10, 1973, the Commission issued Opinion No. 643-A, which modified the curtailment priorities and adopted certain definitions to be employed in connection with the curtailment plan. Finally, in Opinion No. 643-B issued June 8, 1973, the FPC denied all further petitions for rehearing but did grant Arkla an extension of time to comply with the Order which had accompanied Opinion 643-A.[10]

The curtailment plan as finally prescribed [11] by the FPC had the following nine priority-of-service categories:

---

[10] Arkla filed revised tariff sheets on February 5, 1974, and a permanent curtailment plan was placed in effect on the Arkla system on February 20, 1974.

[11] Concurrently with the issuance of Opinion No. 643 on January 8, 1973, the Commission issued Order No. 467, 49 FPC 85, a statement of policy on the priorities of deliveries to be observed by natural gas companies during periods of curtailment. The eight priority-of-service categories were identical to those prescribed in Opinion No. 643. Order No. 467 was subsequently amended by Order Nos. 467-A and 467-B, 48 FPC 217, 583 (1973), and ultimately contained the identical categories prescribed for Arkla in Opinion No. 643-A.

In *Pacific Gas and Electric Co.* v. *FPC*, 164 U.S.App.D.C. 371, 506 F.2d 33 (1974), this court held that as a general statement of policy Order No. 467 was exempt from the rule-making requirements of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1970), and further that Order No. 467 was not reviewable.

On rehearing in the Arkla proceedings, the Commission explicitly disavowed any reliance on Order No. 467, *see* 49 FPC at 910, and

(1) Residential, small commercial (less than 50 Mcf on a peak day).

(2) Large commercial requirements (50 Mcf or more on a peak day), firm industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements.

(3) All industrial requirements not specified in (2), (4), (5), (6), (7), (8), or (9).

(4) Firm industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(5) Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler fuel use where alternate fuel capabilities can meet such requirements.

(6) Interruptible requirements of more than 300 Mcf per day, but less than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(7) Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day), when alternate fuel capabilities can meet such requirements.

(8) Interruptible requirements of more than 3,000 Mcf per day, but less than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.

(9) Interruptible requirements of more than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.

---

other than noting its existence, we must review the Arkla curtailment plan without regard to Order No. 467.

49 FPC at 913-14. The curtailment plan is based principally on the "end use" which is made of the gas. Each higher priority end use is fully protected from curtailment until all lower priorities have been curtailed 100%. None of the petitioners quarrels with the concept of end use as an appropriate consideration for a curtailment plan. Indeed, this court has upheld end use as a proper differentiating factor for the curtailment of natural gas. *American Smelting & Refining Co.* v. *FPC*, 161 U.S.App. D.C. 6, 494 F.2d 925, 935-36, *cert. denied*, 419 U.S. 882, 95 S.Ct. 148, 42 L.Ed.2d 122 (1974). *Accord*, *Louisiana* v. *FPC*, 503 F.2d 844, 858 (5th Cir. 1974). But although they do not attack the fundamental basis of the curtailment plan, each of the petitioners is nevertheless dissatisfied with certain aspects of it. The petitioners by no means represent a united front; each of them advances different objections and, by way of intervention, opposes at least some of objections raised by the others. We deal with the various contentions seriatim.

I. Subordination of Gas Used For Generation of Electricity.

[2] AP&L is an electric public utility operating throughout most of the state of Arkansas. Approximately 97% of AP&L's generating capacity was designed to operate by burning natural gas as a fuel, and in the past Arkla has filled the vast majority of AP&L's natural gas needs.[12] AP&L objects strenuously to the low priority (Category 5) assigned to large volume use of natural gas as a boiler fuel. Only interruptible requirements are given lower priority. Aside from questioning the validity of the Commission's reasons, AP&L contends that this inferior treatment of electric generating companies discriminates against users of electricity and has in fact jeopardized AP&L's ability to serve the needs of

[12] R. 1102-03.

its customers. Many of these users of electricity, AP&L points out, are residential and small commercial "human needs" customers of the same type as the gas users the FPC has so assiduously sought to protect by placement in Category 1.

We are, of course, mindful of the present-day uncertainties permeating the entire energy field, and we believe that the Commission has struck a reasonable accommodation between the necessity for allocating scarce natural gas supplies and the need to assure the availability of electric power. Opinion No. 643 gave four reasons for downgrading boiler fuel as an end use:

(1) Boilers make a relatively inefficient use of gas —use for the generation of electricity results in a loss of roughly two-thirds of the heating value of gas used.

(2) Those who use gas in boilers can generally substitute other fuels more readily and at lower cost than other gas users.

(3) Pollution control is more practical because of the large size of individual installations.

(4) Because other fuels can be easily substituted as boiler fuel, the economic dislocations caused by the natural gas shortage will be minimized by curtailing use in boilers before other large scale industrial and commercial uses.

Like the Fifth Circuit, which in *Louisiana* v. *FPC*, *supra*, reviewed a natural gas curtailment plan in many respects similar to this one, we must reject reasons 3 and 4.[13] The parties cite no portion of the record which

[13] 503 F.2d at 859. Although the Fifth Circuit was reviewing Opinion Nos. 647 and 647-A, dealing with a curtailment plan for United Gas Pipe Line Company, the FPC had in that case expressly adopted the reasoning of Opinion No. 643 with respect to large volume use of natural gas in boilers. *See* 503 F.2d at 857-58.

supports the Commission's conclusion that boilers provide a better means of pollution control. While this may well be so, we are at a loss to explain how the Commission arrived at this conclusion. Nor can the Commission's theory of minimization of economic impact add independent support to the low priority assignment of boiler fuel. This reason is based on another of the reasons given by the Commission, namely the ability of boiler operators to substitute alternate fuels, and therefore for its validity depends wholly on the accuracy of its underlying premise.

Nevertheless, the remaining reasons given by the Commission are both sufficient justification for the action and adequately supported by the record. The proposition that boiler fuel is an inefficient use of natural gas resulting in significant heat loss was the subject of testimony and does not appear to have been seriously disputed.[14] Thus it seems reasonable to divert natural gas away from use as a boiler fuel to uses where its potential may be more fully realized. Similarly, the ability of those using natural gas as a boiler fuel to employ alternate fuels is well-documented. At the time of the hearing, for example, AP&L's generating equipment had the capability of "split-firing" a mixture of oil and natural gas.[15] Furthermore, although conversion to permit the burning of 100% oil would not be without its attendant problems and costs, testimony indicated that such a measure was certainly feasible.[16] Therefore any shortfall in the supply of natural gas that made split-firing an inadequate solu-

---

[14] R. 164, 313, 571.

[15] About one-fifth of AP&L's equipment could operate on a 50%-50% mixture of oil and natural gas. Approximately four-fifths needed a mixture of 65% natural gas to 35% oil. R. 1397-1405.

[16] R. 1267-68.

tion to the shortage can be overcome by conversion of existing equipment.[17]

[3] AP&L persists, however, by arguing that the Commission's reliance on alternate fuels as a solution to the natural gas shortage is unrealistic. It objects first to the Commission's definition of "alternate fuel capability." Opinion No. 643-A defined this "as a situation where alternate fuel could have been utilized whether or not the facilities for such use have actually been installed." 49 FPC at 912. AP&L asserts that this definition is unreasonable since it does not account for those who failed to build alternate facilities under the assumption and with the assurances of an abundant supply of natural gas. But the Commission defined alternate fuel capability without regard to whether facilities were actually installed to avoid penalizing those who had had the foresight to install such facilities. This reason is both sound and just. Since Arkla representatives notified AP&L as early as May 1970 of the impending gas shortage and advised it to make provision for the use of alternate fuels, AP&L [18] had full opportunity to take appropriate action and presumably made its business decisions with reasonable awareness of the potential consequences.

[4-6] Nor do we believe that present-day uncertainties concerning the available supply of petroleum render the curtailment plan unworkable. To be sure, the ability to procure adequate quantities of oil is certainly more open to question than it once may have been, but we were advised by counsel at oral argument that AP&L continues to generate necessary amounts of electricity, albeit at substantially higher cost than formerly. Moreover, the orders of the Commission make adequate pro-

[17] Furthermore, AP&L has the necessary interconnections to purchase power from other utilities, provided, of course, the availability of alternate fuels permits the others to export power.

[18] R. 598-600, 854-55, 1214-15.

vision for dealing with the vagaries of alternate fuel supplies and assuring continuous electric service. The order accompanying Opinion No. 643-A requires Arkla's tariff to contain "an emergency exemption from curtailment for all electric utility customers to the extent required to avoid the shedding of firm electric load. . . ." 49 FPC at 915. If indeed AP&L is confronted with a situation where electric power to its customers is in danger of being terminated, whether it be because of lack of petroleum, or for some other unforeseen reason, it can apply for an exemption. There is no reason to believe that this procedure would not provide adequate protection to AP&L and its customers.[19]

II. The Commission's Treatment of Interruptible Service.

"Interruptible", as opposed to "firm", contracts essentially provide that a pipeline company may terminate delivery on short notice. *Monsanto Co.* v. *FPC*, 149 U.S. App.D.C. 396, 463 F.2d 799, 801 (1972). In the Arkla proceedings, the Commission took the position that curtailment should generally fall first upon those customers who purchase gas on an interruptible basis (the reasons for this determination will be discussed in due course). Interruptible requirements of gas were therefore included in the four lowest priority categories.[20] At the same time,

---

[19] We also must reject AP&L's argument that the curtailment plan violates the Commission's duty under section 202(a) of the Federal Power Act, 16 U.S.C. § 824a(a) (1970), to assure "an abundant supply of electric energy throughout the United States." Section 202(a) deals with the FPC's duty to divide the country into regional electric energy districts and has nothing whatever to do with the curtailment of natural gas in times of shortage. Moreover, as the discussion in the text shows, we believe that the Commission has made adequate provision to protect users of electricity.

[20] The Commission defined "firm" and "interruptible" as follows:

> *Firm Service*: Service from schedules or contracts under which a seller is expressly obligated to deliever specific volumes

however, the Commission left open the possibility that the interruptible nature of a contract might be disregarded in certain circumstances in order to meet the needs of high priority end users.

With respect to this treatment of interruptible service, the various petitioners advance arguments which are fundamentally at odds with each other. On the one hand, GM asserts that the distinction between firm and interruptible service is inappropriate for dealing equitably with the natural gas shortage. On the other, Arkla and AP&L contend that it is improper for the Commission to ignore the interruptible nature of some gas service and in essence to elevate some interruptible customers to the status of firm users. We deal with the latter contention first.

A. *Sales of gas to Mississippi River Transmission Corporation.*

Mississippi River Transmission Corporation (MRT) is a natural gas company which operates a pipeline system and sells natural gas in five states. Until April 1971, when deliveries to MRT ceased, Arkla supplied a portion of the gas needed by MRT to service its market area. The "contract" between Arkla and MRT provided for sales of "whatever volumes of gas Seller may from time to time be agreeable to selling." That is to say, any sales of natural gas to MRT were at Arkla's option. There being no obligation on the part of Arkla to sell

---

within a given time period and which anticipates no interruption, but which may permit unexpected interruption in case the supply to higher priority customers is threatened.

Interruptible Service: Service from schedules or contracts under which seller is not expressly obligated to deliver specific volumes within a given time period, and which anticipates and permits interruption on short notice, or service under schedules or contracts which expressly or impliedly require installation of alternate fuel capability.

49 FPC at 911-12.

any gas, even when supplies were sufficient to allow such sales, the service to MRT can obviously be termed "interruptible" under any definition of that term.[21] Despite the non-existence of a contractual right providing that MRT receive gas from Arkla, the Commission left open the possibility of MRT receiving gas based on the needs and priorities of its customers. In other words, contractual obligations might give way in favor of end uses. In Opinion No. 643-A the Commission stated:

> Finally, AP&L argues that the Commission erred in holding that Mississippi River Transmission Corporation (MRT) is entitled to receive any Arkla gas. We indicated in Opinion No. 643 that even though MRT is an interruptible customer it might take appropriate action to procure an exception from Arkla's classification or proposed curtailment percentage where irreparable injury to life or property might occur because of unusual or special circumstances. . . .
>
> . . . While Arkla's contract with MRT provides for interruptible service, a curtailment plan which would prevent MRT from receiving any gas, even for residential service, while boiler fuel users receive gas is discriminatory and unjust and unreasonable. As Opinion No. 643 explains, we must look beyond contracts between Arkla and its customers to the end-use of gas.

49 FPC at 910-11. Again, in Opinion No. 643-B, the Commission stressed the importance of protecting high priority needs and indicated that "the gas to be delivered to MRT will be measured by the end uses of the gas by

---

[21] In fact, the Arkla-MRT contract provides for what might be considered the *most* interruptible type of service, since under other types of interruptible contracts there is an explicit commitment to sell gas when it is available.

MRT's customers as applied to the schedule of priorities." 49 FPC at 1320.

[7] Arkla contends that the Commission has imposed a delivery obligation upon it without following the procedures prescribed by section 7 of the Natural Gas Act, 15 U.S.C. § 717f. Section 7(c) requires natural gas companies to obtain a certificate of public convenience and necessity before engaging in interstate sales of natural gas. A certificate covering interruptible sales from Arkla to MRT was issued in 1965. The FPC may not compel a company to accept a certificate that it does not want, *W. W. Harvey*, 31 FPC 880, 881 (1964), and section 7(a)[22] provides the means whereby the Commission can order an enlargement of service already under a certificate when it is in the public interest to do so. Notice and hearing are required, and the Commission is without authority to order enlargement of service when to do so would impair the ability of the natural gas company to render adequate service to its customers. Arkla argues that in effect changing its interruptible contract with MRT to a firm service obligation is an alteration of the

---

[22] The Natural Gas Act, § 7(a), 15 U.S.C. § 717f(a) (1970), provides:

> Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

applicable certificate of public convenience and necessity, requiring the procedures and findings of section 7(a). Since the Commission has undertaken to regulate curtailment of gas under sections 4 and 5 of the Act, it is undisputed that section 7 procedures have not been followed.

[8] On the authority of *American Smelting & Refining Co.* v. *FPC*, 161 U.S.App.D.C. 6, 494 F.2d 925, *cert. denied*, 419 U.S. 882, 95 S.Ct. 148, 42 L.Ed.2d 122 (1974), we must reject Arkla's claims. *American Smelting* dealt with a temporary curtailment plan for the Southern Division System of the El Paso Natural Gas Company. The customers served by El Paso were of essentially two types. The service provided the so-called East-of-California (EOC) customers was by the terms of their contracts subject to curtailment, whereas El Paso served its California customers under firm contracts. 494 F.2d at 933. El Paso's existing tariffs provided for complete cut-off of all EOC buyers, and historically these customers had borne the entire burden of curtailments. The Commission, however, approved a plan under which all El Paso customers would endure the gas shortage ratably. Against the contention of the "firm" customers that buyers served under "interruptible" contracts received a windfall, since they would not experience the curtailments for which they had contracted, the court upheld the Commission's action. The court noted that section 5(a)[23] of the Natural Gas Act gives the Com-

[23] The Natural Gas Act, § 5(a), 15 U.S.C. § 717d(a) (1970), provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust,

mission authority to override discriminatory or unreasonable contractual arrangements and found that the Commission had properly made the requisite finding of discrimination. 494 F.2d at 934-35. Moreover, the *American Smelting* court expressly dealt with the argument advanced here that the plan as prescribed by the Commission effected a reallocation of gas supplies under section 7(a). Discussing the portion of section 7(a) that prohibits the Commission from ordering enlargement of sales when to do so would impair service to existing customers, the court said:

> Quite clearly, this statutory restriction is not infringed by a curtailment plan based on end use. The curtailment plan does not order the sale of additional gas to one customer to the detriment of another. Rather, it prescribes a formula for allocating insufficient supplies among existing customers. We are not unmindful of Willcox' argument that *the effect* of the interim plan under review is the same as an order reallocating gas supplies from one customer to another, since the former plan would have protected California customers from service curtailments. Even if this is true, however, we do not think the statutory prohibition applies to curtailment plans. Section 7(a) is plainly intended to regulate *expansions* of service.

---

unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

494 F.2d at 936 (emphasis in original).

American Smelting governs here. In the instant case the FPC found that a plan preventing MRT from getting any gas would be "discriminatory and unjust and unreasonable", and the Commission is therefore entitled to prescribe alternative arrangements. And as in *American Smelting*, providing for interruptible customers to receive gas in accordance with its end use, would not violate section 7.

Having therefore determined that the Commission is not *required* to place interruptible users such as MRT in lower categories than firm users, we now consider whether it was proper for the Commission to do so.

B. *The distinction between firm and interruptible service.*

Although many Arkla contracts contain interruptibility clauses, these generally provide that service is interruptible to the extent necessary to protect human needs.[24] Before the Administrative Law Judge and the Commission, Arkla took the position that this was actually firm service[25] (a position also adopted by the Commission in its definition of firm service; see note 20 *supra*). Arkla asserted that only two of its customers (MRT, discussed above, and the Ideal Cement Company) received service on what could legitimately be termed an interruptible basis. As a consequence, only a few purchasers of Arkla gas stood to be affected by any ruling that gave preference to firm customers—the two companies purchasing from Arkla on an interruptible basis and any of Arkla's few pipeline customers who purchased from Arkla for resale and in turn sold on an interruptible basis. The Commission nevertheless gave detailed consideration to

[24] R. 750.

[25] R. 459.

the distinction between firm and interruptible users, although not actually classifying any customer in either category. Subject to the approval of the Commission, that task fell to Arkla in the course of preparing its revised tariff sheets.

GM now attacks the distinction as arbitrary, discriminatory, overly vague, and not supported by substantial evidence.

[9, 10] We do not agree with GM that the concepts are so vague as not to be useable. It may be that there are many different versions of interruptibility clauses and some variance among people in the natural gas field as to the meaning of "firm" and "interruptible." But this does not mean that these variations cannot fit within the definitions formulated by the Commission. Although seller and buyer may on occasion have differences of opinion on how a particular contract should be classified, we do not perceive the problems in this area to be insurmountable. We do, however, concur in GM's contention that the reasons given by the Commission are not supported by substantial evidence.[26] Moreover, at least on the basis of the reasons thus far articulated by the Commission, we have doubts about the propriety of the distinction between firm and interruptible service for the purpose of a gas curtailment plan.

The Commission gave two reasons[27] for curtailing interruptible sales before firm sales: the inferior uses of gas sold on an interruptible basis and the expectation

---

[26] Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (1970) provides, *inter alia*, that "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

[27] The Commission expressly disavows any reliance on the fact that interruptible customers may pay a lower price for gas as a basis for upholding its order. Respondent's Brief at 50-51.

that interruptible customers can be expected to have alternate fuel facilities already operational.[28] As stated by the Commission:

> [W]e have determined that interruptible sales are for the most part, predicated on end-use considerations; those customers, be they direct sales or indirect sales, who require gas for human needs service or non-substitutable industrial service do not contract on an interruptible basis. Interruptible service, at the lower rates charged for such service, envisions interruption. And accordingly, interruptible customers can most reasonably be expected to have alternate fuel facilities already operational. We conclude, therefore, that curtailment should first fall on those who have not historically borne the full-fixed costs of providing gas service, particularly since these customers are best prepared to accept interruptions in service and clearly do not require uninterrupted service for protection of life or property.

Opinion No. 643, 49 FPC at 66 (footnotes omitted). These assertions seem sound as a pure matter of common sense—if gas supplies are of the utmost importance to a customer, one might suppose that the customer would do all that is possible to assure a steady supply. Failing that, the customer might nevertheless make provision for alternate fuels. Unfortunately, however, what may appear to be common sense seems without record support. The Commission and the parties supporting its position

---

[28] We note that the Commission's reference to *already operational* alternate fuel facilities differs from the definition of alternate fuel capability, which does not require that the alternate fuel facilities even be installed. Were the Commission relying on alternate fuel capability to support the distinction between firm and interruptible service, the reason would add nothing, since Categories 6-9 by their terms do not apply unless the interruptible users have alternate fuel capability. *See Louisiana* v. *FPC*, *supra*, 503 F.2d at 872.

have cited no portion of the record in support of the proposition that interruptible gas is used for inferior purposes. Indeed, there is some indication that schools, churches, and hospitals—presumably all human needs customers—do in fact purchase on an interruptible basis.[29] Nor is there significant evidence that interruptible customers have alternate fuel facilities already operational. By and large, curtailments under contract interruptibility provisions were expected to be infrequent and of brief duration.[30] Buyers did not contemplate the perhaps lengthy curtailments caused by an overall shortage of natural gas. Although interruptible customers were on notice to have alternate fuel facilities available, some apparently did not make appropriate arrangements, evidently preferring instead to endure expectedly short periods without fuel supply.[31]

The Commission seeks to avoid the import of this lack of evidentiary support by asserting on appeal that it "by no means sought to prescribe an inflexible system of priorities" but rather "was merely attempting to give Arkla general guidance in the implementation of its curtailment plan." [32] The Commission stresses the existence of emergency relief provisions to overcome inequities resulting from rigid adherence to the priority categories. But this "flexibility" is scarcely supported by language in Opinion No. 643-A that "Arkla *shall* observe the following priority of service categories" in curtailing deliveries. 49 FPC at 913 (emphasis added). And more importantly, the applicable emergency provision in the

---

[29] R. 1827-28. MRT, an interruptible customer, also asserted that it used Arkla gas to service human needs customers. R. 1478, 1529-31.

[30] R. 538-40, 751, 1479-80, 1827-29.

[31] R. 557-58.

[32] Respondent's Brief at 43.

Order only requires sufficient flexibility to allow supplemental deliveries where required "to forestall irreparable injury to life or property." *Id.* at 915. It is apparent that the emergency provision was only intended to deal with difficulties of users in the very dire circumstances. It cannot ameliorate the evidentiary shortcomings of the Commission's order.

Even if it could be assumed that the reasons stated for adopting the firm-interruptible distinction were supported by substantial evidence, we would have some difficulty with the Commission's treatment of interruptible customers. Like the Fifth Circuit in *Louisiana* v. *FPC*, *supra*, 503 F.2d at 872, we question why the fact that interruptible gas is put to inferior uses would support injection of a factor other than end use into the curtailment plan. Would not end use as the sole criterion of a plan adequately insure that interruptible gas is given the appropriate low priority? Furthermore, we are somewhat puzzled by the priority accorded interruptible sales of gas where there is no alternate fuel capability. Under the plan all such interruptible sales go into Category 3, the catch-all for industrial categories not specified in the other categories. 49 FPC at 1319. Yet firm sales for an identical use might be in a different category. For example, firm "plant protection, feedstock, and process needs" —all uses for which no alternative fuel can be used—are in Category 2. Since both reasons given by the Commission for assigning interruptible sales low priorities—inferior end uses and the availability of already operational alternate fuel facilities—are absent with respect to interruptible sales for plant protection, feedstock, and process needs, why should they not be given the same priority as firm sales for the same purposes? Because the Commission's reasons for distinguishing between firm and interruptible service are not supported by substantial evidence, we must remand for further proceed-

ings relating to the supposed inferior use of natural gas by interruptible customers and the alternative fuel capabilities of such customers. If, on remand, the Commission, having then taken further evidence, is inclined to reinsert the distinction, it would be exceedingly helpful if it addressed itself to these questions.

III. Pipeline Customer Storage Injection Requirements.

[11] As initially promulgated in Opinion No. 643, none of the priority-of-service categories included gas for the storage injection requirements of Arkla's customers. *See* 49 FPC at 65. In Opinion No. 643-A, however, the Commission amended Category 2 to include "pipeline customer storage injection requirements." 49 FPC at 914. In explanation of the amendment, the Commission stated:

> To [Category 2] we add "pipeline customer storage injection requirements" because storage gas, although accumulated during the summer, is used to meet the peak demand of winter of high priority customers including residential and small commercial customers, and should be protected on a high priority basis.

49 FPC at 912. Arkla thereafter objected to this amendment, asserting principally that having met the needs of their residential and small commercial customers, the pipeline customers might use the storage gas to service their own industrial customers; alternatively, Arkla might be put in the position of supplying the pipeline's residential and small commercial customers twice over. In essence, Arkla contended that storage gas should be the responsibility of the receiving pipeline. The Commission rejected these contentions in Opinion No. 643-B.

> In our opinion the availability of storage gas is a protection to the customers of the receiving pipeline as well as Arkla. The use of storage can be made possible and encouraged by granting a high priority

> to deliveries for this purpose. We believe it our responsibility to support the development of storage supplies for the benefit particularly of residential and commercial customers who require space heating gas in the winter. Of course, we do not mean that Arkla should supply gas twice over to a customer with storage capability, and we do not believe the hypothetical circumstances presented by Arkla to be reasonable.

49 FPC at 1320.

Arkla's principal objection before this court is that prior to the amendment pipeline customers' storage injection requirements were never an issue or the subject of any evidentiary presentation. And, indeed, in this observation Arkla seems correct. Although there is some indication in the record of the extent and importance of Arkla's storage requirements,[33] there is no evidence concerning the needs of Arkla's pipeline customers, the importance of storage with respect to serving the needs of high priority users, or the ultimate disposition of gas withdrawn from storage by Arkla's pipeline customers. In short, the Commission appears to have acted, not on the basis of the record before it, but rather to further what it regards (on what basis we cannot tell) to be a sound policy.

At oral argument counsel for the FPC took the position that we should sustain the Commission's action as a sound exercise of its policy-making function. Counsel cited *Public Service Commission of the State of New York* v. *FPC*, 149 U.S.App.D.C. 421, 463 F.2d 824, 830 (1972) wherein this court stated:

> In this difficult time of critical gas shortage, a reviewing court must be particularly careful to en-

[33] R. 125-26, 163, 403-07.

> sure that the Commission is permitted to carry out its policy-making function which Congress gave it in the Natural Gas Act, and we may not substitute our policy judgments for those of the Commission.

With this proposition we have no quarrel, but in *Public Service Commission* the court at several points stressed the careful consideration given by the Commission and the record support for its conclusions. Here, in contrast, the Commission introduced the issue of pipeline customer storage injection requirements only at a late stage in the proceedings, and without the benefit of the views of the parties before it. The Commission may want to encourage the use and installation of storage facilities, but in this adjudicatory proceeding it is nevertheless obliged to act on the basis of the record before it. Because the Commission apparently did not do so with respect to pipeline storage injection requirements, we must remand the matter to the Commission for the taking of further evidence on this aspect of the plan.

IV. Compliance with NEPA.

The National Environmental Policy Act of 1969 (NEPA) requires that "to the fullest extent possible" federal agencies shall issue a statement detailing the environmental impact of any major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1970). No party to the Arkla curtailment proceedings raised the issue of compliance with NEPA until the case was before this court.[34] The

---

[34] The lateness of the assertion of this issue seems to bespeak a desire to delay the implementation of the permanent Arkla curtailment plan rather than a sincere concern for the effects of the plan on the environment. See also *Environmental Defense Fund, Inc. v. EPA*, 160 U.S.App.D.C. 123, 489 F.2d 1247, 1256 n.57 (1973).

Commission, having in other proceedings[35] taken the position that NEPA cannot be applied to curtailment plans because the numerous indeterminate variables, such as the extent and duration of the shortage and the availability of alternative fuels, would make any environmental conclusions almost wholly speculative, did not on its own motion file an impact statement. The Fifth Circuit recently held in *Louisiana* v. *FPC, supra,* however, that an impact statement is required for permanent gas curtailment plans. The court neither required the impossible nor intended that curtailment plans be fashioned solely to produce an effect easily described in an impact statement. 503 F.2d at 875. But the court did describe the Commission's duty as:

> To make a good faith effort to describe the reasonably foreseeable environmental impact of each curtailment plan using the five factors listed in NEPA's section 102(C).

503 F.2d at 877. *See also Natural Resources Defense Council, Inc.* v. *Morton,* 148 U.S.App.D.C. 5, 458 F.2d 827, 838 (1972).

[12-14] We agree with the reasoning in *Louisiana* v. *FPC*,[36] and at oral argument counsel for the FPC advised us that the Commission now files impact statements in connection with all permanent curtailment plans. Nevertheless, the Commission argues that section 19(b) of the Natural Gas Act renders us without authority to

---

[35] *El Paso Natural Gas Company,* 48 FPC 371 (1972); *United Gas Pipe Line Company,* 49 FPC 179 (1973), *vacated and remanded sub nom. Louisiana* v. *FPC,* 503 F.2d 844 (5th Cir. 1974).

[36] The Fifth Circuit relied in large measure upon this court's decisions in *American Smelting and Refining Co., supra; Calvert Cliffs' Coordinating Committee* v. *AEC,* 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971); *Scientists' Institute for Public Information, Inc.* v. *AEC,* 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973); and *Natural Resources Defense Council, Inc.* v. *Morton, supra.*

consider the issue of compliance with NEPA, since the question was not raised before the Commission and no explanation for that failure has been advanced.

We disagree. Section 19(b) provides in part:

> No objection to the order of the Commission shall be considered by the [reviewing] court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.

15 U.S.C. § 717r (1970). In *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-99, 75 S.Ct. 467, 99 L.Ed. 583 (1955), the Supreme Court held that section 19(b) requires a party to exhaust administrative remedies before seeking judicial review, the purpose being to allow the Commission the opportunity to pass first on a question. But the exhaustion of remedies doctrine which is expressed in the statute is not inflexible; it allows for deviation where the interests of justice dictate. *See Hormel* v. *Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 85 L.Ed. 1037 (1941); *Great Falls Community TV Cable Co.* v. *FCC*, 416 F.2d 238, 239 (9th Cir. 1969); *Board of Public Instruction* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969); 3 *K. Davis, Administrative Law Treatise* § 20.06 (1958). And this is a case in which the agency has for all practical purposes had an opportunity to pass on the issue sought to be raised. The Commission expressed its opinion that NEPA did not apply to curtailment proceedings in *El Paso Natural Gas Company*, 48 FPC 371 (1972), and reiterated the same view in *United Gas Pipe Line Company*, 49 FPC 179, 192-93 (1973), *vacated and remanded sub nom. Louisiana* v. *FPC, supra*, seven days after the filing of Opinion No. 643 in this case. There is no reason to believe that its position would have been any different in the Arkla proceedings had the issue been raised. *See Great Falls Community TV Cable Co.* v. *FCC, supra.* Were we to hold that section 19(b) fore-

closes us from considering the NEPA objection, we would be presented with the unseemly prospect of a violation of a statutory duty now recognized by the Commission to exist without the means to direct compliance. The exhaustion of remedies doctrine surely does not compel such a result, and accordingly we hold that the Commission is required to file an impact statement in connection with the Arkla permanent curtailment plan.

V. Conclusion

We hold that the Commission's orders are deficient in several respects. Neither the distinction drawn by the Commission between firm and interruptible service nor the inclusion of pipeline storage injection requirements in Category 2 are supported by substantial evidence. Furthermore, the plan was implemented without preparation of the environmental impact statement required by NEPA. However, the Commission's plan has now been in operation for over a year, and therefore we do not believe that it would further the orderly administration of natural gas curtailment on the Arkla system for us immediately to vacate the plan. Accordingly, the Commission's order may remain in effect for a reasonable period of time pending its prompt action on matters remanded for further consideration. *See American Smelting and Refining Co.* v. *FPC*, *supra*, 494 F.2d at 949.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1974

No. 73-1637, 73-1655, 73-1717, 73-1800

[Filed Aug. 21, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

ARKANSAS POWER & LIGHT COMPANY
GENERAL MOTORS CORPORATION
ARKANSAS LOUSIANA GAS COMPANY,
Petitioners

v.

FEDERAL POWER COMMISSION,
Respondent

REYNOLDS METALS COMPANY, ARKANSAS LOUSIANA GAS COMPANY, GENERAL MOTORS CORPORATION, CITIES SERVICE GAS COMPANY, ARKANSAS POWER & LIGHT COMPANY, MISSISSIPPI RIVER TRANSMISSION CORPORATION, LACLEDE GAS COMPANY,
Intervenors

ON PETITIONS TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

Before: MOORE,* Senior Circuit Judge for the Second Circuit, MacKINNON and ROBB, Circuit Judges

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

JUDGMENT

These causes came on to be heard on petitions to review orders of the Federal Power Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that these cases are remanded to the Federal Power Commission for further consideration, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
Hugh E. Kline
Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Date: August 21, 1975

Opinion for the Court filed by Senior Circuit Judge Moore

(4909)

APPENDIX C
4909

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Opinion No. 643

ARKANSAS LOUISIANA GAS COMPANY

Docket No. RP71-122

Opinion and Order Reversing Initial Decision, Approving Curtailment Plan and Directing Further Proceedings

Issued: January 8, 1973

* * * * * * * * * *

4910

[APPEARANCES]

* * * * * * * * * *

4911

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

ARKANSAS LOUISIANA GAS COMPANY

Docket No. RP71-122

Opinion No. 643

Opinion and Order Reversing Initial Decision, Approving Curtailment Plan and Directing Further Proceedings

(Issued January 8, 1973)

MOODY, Commissioner:

1. This proceeding arose with the filing by Arkansas Louisiana Gas Company (Arkla) on May 18, 1971, of a tariff change in accordance with the Commission's Order No. 431 to provide a schedule for curtailment of service to

its customers. By Commission orders of June 7, 1971 and June 15, 1971, the tariff change was suspended through October 15, 1971. The Presiding Administrative Law Judge, Alvin A. Kurtz, found Arkla's gas supply not critical and held its curtailment plan for naught. Here we find that a curtailment plan is appropriate, and that, with some modifications Arkla's curtailment tariff provision is just and reasonable.

2. Arkla, of Shreveport, Louisiana, is a natural gas company under the Natural Gas Act engaged in the production, purchasing, gathering, processing, transportation, distribution and sale of natural gas in Arkansas, North Louisiana, East Texas, Oklahoma, and South Kansas, with one sale in Southern Missouri, which is made to Cities Service Gas Company (Cities). Arkla operates five separate systems. The Ark-La-Tex System, which serves Cities, is the largest; the other systems are the McAlester, Ada and Lawton Systems in Oklahoma and the Oklahoma-Kansas "Main Line" System, extending from Oklahoma into Kansas. About 59 percent of Arkla's

sales are made to industrial customers, and only about 7.6 percent are for resale. Sales for resale are made only to Mississippi River Transmission Corporation (MRT) and Cities on the Ark-La-Tex System and to five small distribution companies on the Main Line System.

3. Arkla's proposed curtailment plan is essentially like one filed with the Arkansas Public Service Commission. The plan places Arkla's sales in several categories interruptible in the following order: Category I, sales which are subject to interruption at seller's discretion under contracts or tariffs which provide in effect for the sale of such gas as seller may be agreeable to selling and buyer may be agreeable to buying; Category A, large users of gas for boiler

(4912)

fuel or other users where alternate fuels can be used, not determined by whether a user has actually installed alternate fuel facilities; Category B, large users for fuel or raw material where an alternate cannot be used; Category C, deliveries to small industrials and regular commercial loads and for use as pilot lights or in accessory equipment to avoid damage to plants; Category D, deliveries for schools, churches, residentials, hospitals and other human needs customers.

4. The curtailment plan also provides that Arkla will be relieved of all liabilities for failure to deliver the volumes of gas desired by any customer.

5. Arkla asserts, as an emergency interim policy, that until reserves can be augmented, as by the pipeline to the Deep Anadarko Basin in Docket No. CP70-267, it will "husband" its gas reserves by receiving gas at rates calculated to permit maximum peak day recovery of gas even though this will result in lowered immediate production and thus increase curtailments.

6. A hearing in this proceeding commenced on July 13, 1971, and was concluded on August 6, 1971, before the Administrative Law Judge, who issued his initial decision on October 13, 1971. The Administrative Law Judge found the supply of gas available to Arkla not immediately critical, saw the possibility of discrimination in the curtailment program, and ordered, subject to Commission review, that the proposed curtailment program be held for naught and the filing cancelled and rejected.

4913

7. Exceptions were filed by Arkla, The Gas Service Company, the Staff, Arkansas Power & Light Company (AP&L), the Arkansas Public Service Commission, Continental Oil Company, Cities, MRT, Laclede Gas Company, and Southwestern Electric Power Company (SWEPCO).

Briefs opposing exceptions were filed by Arkla, Cities, Continental, AP&L, Laclede, Gas Service, MRT, SWEPCO, City of Ruston and the Staff.

8. During the course of the proceedings, the Commission issued several interim orders. On July 16, 1971, it denied a request by Continental to modify Order No. 431 so that it would not affect direct sales contracts, refused MRT interloculatory relief, and denied SWEPCO's request for an indefinite suspension of the curtailment plan. On November 5, 1971, it denied waiver of exceptions and answers. On November 18, 1971, it ordered Arkla to take necessary steps to enforce its curtailment plan and to prevent SWEPCO from taking volumes of gas in excess of the volumes allocated to it. On November 30, 1971, it granted interim relief to Cities by requiring Arkla to deliver volumes up to 75,000 Mcf per day to Cities to the extent necessary to protect firm service.

THE COMMISSION'S JURISDICTION

9. Continental, AP&L, the Arkansas Commission and SWEPCO variously argue that under Section 1(b) of the Act, the Commission does not have jurisdiction to curtail sales to direct customers because it has jurisdiction only over sales for resale and that, even if this were a certificate case, the Commission's jurisdiction over transportation in interstate commerce does not extend to direct sales. These issues are foreclosed by *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). We continue to assert our plenary jurisdiction over curtailment plans of jurisdictional pipelines as set forth and discussed in Opinions 606[1] and 606-A.[2] *United Gas Pipe Line Company,* Docket Nos. RP71-29, *et al.*

---

1 46 FPC 786, October 5, 1971, appeal docketed *sub nom. Mobile Gas Service Corp. et al.* v. *F.P.C.* No. 71-1607, 5th Cir.

2 46 FPC 1290, December 3, 1971.

10. The argument is advanced by the Gas Service Company that the proposed curtailment amounts to an abandonment of service and therefore requires an application under Section 7(b) of the Act. In our opinion Section 7(b) applications are required only where permanent reduction in deliveries are sought. *United Gas Pipe Line Company*, 46 FPC 786, 802-803 (1971). Inasmuch as Arkla's curtailment problem may be diminished or eliminated due to availability of additional gas supplies authorized in Opinion No. 612[3], no permanent delivery reduction is contemplated. Furthermore, nothing in Arkla's plan or our modifications thereof would permanently change any delivery obligations by Arkla; curtailment plans speak to temporary diminution of service, not permanent abandonment.

A Curtailment Plan Is Necessary

11. The Administrative Law Judge concluded that the supply of gas available to Arkla was not immediately critical. He noted particularly that Arkla claimed a gas reserve life index of about 14.25 years, and this did not include the proposed Anadarko expansion to secure an additional supply.[4] Total system reserves, he found, were 7.6 trillion cubic feet in 1970 compared to 7.72 trillion in 1969. The ratio of gas reserves to withdrawals was 18.3 in 1965, increased to 20.0 in 1968 and thereafter declined to 14.1 in 1971. He found that demands on all the systems owned by the company would increase in 1972 but then decline in 1974 (see Ex. 2, Sch. 3). Despite these findings, the Administrative Law Judge noted that Arkla was employing a "husband-

---

[3] *Arkansas Louisiana Gas Company*, —— FPC ——, Opinion No. 612, Docket No. CP70-267, issued February 18, 1972.

[4] A certificate of public convenience and necessity was granted in *Arkansas Louisiana Gas Company, supra.*

ing" program under which Arkla's I customers (Ideal Cement Company and MRT) would be curtailed 100 percent on a peak day and annually; the A customers would be curtailed about 98 percent on a peak day, and 58 percent annually except for Cities which would be curtailed about 58 percent on a peak day and annually; the B, C and D customers would not be curtailed (Ex. 18).

12. Cities, Gas Service, AP&L, Continental and SWEPCO agree with the Administrative Law Judge. These parties urge (1) the lack of specific information to support Arkla's reserve computations, (2) evidence of increased sales since 1968, and (3) a general absence of evidence that there is a present lack of availability or deliverability of gas as supporting the Administrative Law Judge.

13. We disagree with the Administrative Law Judge's findings, and we conclude that a present need for a just and reasonable curtailment plan is established. We find these facts to weigh most heavily:

(a) Arkla requires storage operations during the off-peak seasons if reliable and adequate service is to be maintained; without a curtailment program, storage cannot be replenished.

(b) Arkla does not have sufficient deliverability from its present sources of supply to meet peak or annual requirements.

(c) Annual requirements and peak day requirements of the Ark-La-Tex, Lawton and "Main Line" Systems for the years 1971-1974 will exceed supplies.

(d) By 1974 Arkla's customers will face a curtailment of approximately 200 million Mcf even with husbanding (Ex. 28).

(4916)

4916

(e) Arkla has actually been curtailing deliveries since November, 1970 [5], and has avoided curtailment in only one month (May, 1971) since that time.

We find, therefore, that a curtailment plan is necessary.

OBJECTIONS TO ARKLA'S CURTAILMENT PLAN AND ITS APPLICATION

14. *Cities*—This company argues that under its present contract with Arkla filed as Rate Schedule X-26, September 26, 1967, the service was to be firm and noncurtailable. The contract provides for an annual average volume of 100,000 Mcf per day, a daily minimum of 75,000 Mcf, and a daily maximum of 133,000 Mcf. Cities points particularly to the provision required by the Commission [6] that Buyer and Seller agree that Buyer is in parity with other customers in its entitlement to receive service from gas reserves dedicated to the contract and from other reserves.

4917

15. Cities contends that as long as Arkla has the capability to deliver the contract volumes, as it clearly does,

[5] Arkla's reported actual curtailments are as follows:

MCF

	1970	1971	1972
Jan.		7,756,432	11,156,868
Feb.		9,910,750	9,906,881
Mar.		5,937,540	7,286,466
April		1,623,343	6,483,836
May		—0—	5,730,267
June		2,580,560	7,780,310
July		6,883,013	8,656,864
Aug.		6,273,773	9,987,104
Sept.		5,741,890	10,709,467
Oct.		6,873,496	11,983,399
Nov.	3,695,748	8,375,449	
Dec.	6,264,275	9,014,462	

[6] *Cities Service Gas Co.*, 38 FPC 364, 376 (1967).

Cities' customers are entitled to the full contract volumes from Arkla. The only provision in X-26, it says, which permits Arkla to deliver less than the full contract volumes is Section 6(d), which provides that if Seller is unable to deliver the contract volume because of lack of availability or deliverability, Buyer shall have the right to reduce the annual contract volume. It adds that no evidence warrants relief from contractual obligations and no curtailment plan is legally or factually permitted. It contends that the Administrative Law Judge erred in failing to direct Arkla to supply a minimum of at least 75,000 Mcf on peak days. Cities argues that without this amount of gas, firm customers in the area would have to be curtailed and receipt of less than 75,000 Mcf per day will require the construction of additional facilities, but this could not be done this 1971-72 winter. It was this situation which prompted the Commission to issue its emergency order on November 30, 1971, requiring deliveries up to 75,000 Mcf per day as necessary to protect firm service in the Springfield, Missouri, area, although the record is vague as to the precise level at which firm customers would be affected (Tr. 1795-96).

16. Finally, Cities calls it an unbelievable anomaly that Arkla lists schools, hospitals and churches in Category D, though some of them may use gas for boiler fuel purposes, but curtails Cities in Category A although Cities is serving similar customers. It believes Arkla should be required to file a curtailment plan conforming to its contractual obligations or alternatively, deliveries to Cities should not be curtailed any more than if Arkla applied the same curtailment percentages to Cities' market categories as Arkla applied to its own customers, but in any case Cities should receive 75,000 Mcf per day during the winter months.

17. Along similar lines, Cities' customer, Gas Service, objects to Arkla lumping all deliveries to Cities in Cate-

(4917)

gory A and so discriminating in favor of Arkla's own human needs customers and that, since no emergency has been shown, Arkla must continue to meet its contractual obligations. It supports Cities' percentage formula for curtailments by Arkla.

4918

18. In reply Arkla argues that under the Commission's order [*Cities Service Gas Co., et al.*, 38 FPC 364, 376, 390 (1967)] Cities is not entitled to any preference in gas supply. It also argues that Cities end-use method of curtailment would produce inequitable results, for Cities' human needs customers, which Cities would classify in Category D, purchase interruptible gas at lower cost and have agreed to have standby fuel available.

19. Further, Arkla says, Cities' difficulties arise because it is entitled to receive additional gas from Transwestern Pipeline Co. (Transwestern). The record shows that Cities has two contracts with Transwestern. An early contract provided for deliveries of 100,000 Mcf per day (Tr. 1597). Later, (1967) [7] Cities entered into a second contract with Transwestern for amounts increasing up to 250,000 Mcf per day (Tr. 1579-80). However, a certificate was obtained for only 150,000 Mcf per day, and it does not appear that the additional 100,000 Mcf is available (Tr. 1584). The record shows further that Cities is receiving in all from Transwestern 100,000 Mcf per day under the first contract and only 75,000 Mcf per day under the second contract (Tr. 1679). Arkla contends that with the full entitlement of gas from Transwestern plus an additional purchase of 30,000 Mcf per day in the Anadarko area (Tr. 1806) and eliminating the projected increase in interruptible and other loads, Cities will have an excess annual supply of gas in 1975.

---

[7] Tr. 1676.

20. Arkla points out that Cities makes sales to industrials with a provision that the seller shall have the right at all times to curtail or interrupt the deliveries when in seller's sole judgment such gas is needed to protect the supply of gas for customers of the seller with higher priorities (Tr. 1839-40). Arkla concludes that under the end-use method on an annual basis Cities would be curtailed 55.8 percent compared with 58.6 percent shown by Arkla (Ex. 18), while on a peak day basis the end-use method would result in Cities being curtailed 62.2 percent compared with the 58.6 percent under Arkla's proposal.

4919

21. The Staff objects to Arkla's treatment of Cities. It says that the provision in the Commission's 1967 order requiring no preference for Cities only meant that Cities would be treated like any other customer with respect to available gas. Staff thinks that Cities' human needs customers should be treated like Arkla's human needs customers. Using the 45.73 percent figure offered by Cities' witness as representing that portion of its demand devoted to industrial use (Ex. 46), Staff argues that even if Category A were curtailed 100 percent on a peak day, Cities would still receive over 72,000 Mcf. This, it notes, is very close to the 75,000 Mcf volume, below which new facilities would have to be constructed. This computation differs from that of Arkla discussed above because Staff obviously is using the maximum demand of 133,000 Mcf per day for the peak instead of the 100,000 Mcf per day used by Arkla in its brief. Staff would seem to be right in using the maximum demand (see Ex. 18). However, Arkla also differs with Staff because it classified part of the Cities gas in the I Category.

22. Finally, Staff argues that regardless of the disposition of its end-use point, Arkla should not be permitted to

(4919)

treat Cities differently, and preferentially during peak-day curtailments than it treats other customers.

23. Staff is basically correct. This Commission is concerned with the maximum protection possible for residential and other high priority needs. We conceive such protection to be required by the basic purposes of the Natural Gas Act. We cannot look to contracts alone in establishing curtailment priorities. It would be unjust and unreasonable to place all service to Cities in the interruptible category and to the extent that Cities is entitled to relief from the operation of the priorities hereinafter set forth, Cities should seek such relief in accordance with paragraph 49, *infra*.

24. *MRT and Laclede*—MRT, which is classified in Category I by Arkla, receives gas from Arkla under a contract which provides that the gas to be delivered shall be "such gas as seller is agreeable to selling and buyer is agreeable to buying". MRT sells gas to resale customers under contract demand, firm industrials, interruptible industrials, and resale customers in a priority interruptible category. It

4920

has field sources and purchases gas from United Gas Pipe Line Company (United), Natural Gas Pipeline Company (Natural) and Trunkline Gas Company (Trunkline) (Ex. 43).

25. MRT argues that, in spite of the contract language, its purchases from Arkla should be classified in Category D, as firm gas because interruptions would only occur on a given day in "spike peak" situations even during the winter period (Tr. 1480). MRT refers to testimony in the record that it must have Arkla's gas to serve its human needs customers through its priority interruptible sales (Tr. 1478, 1529-31).

26. In answer, Arkla points out, using MRT's Exhibit 43, that, as estimated for the winter 1971-72, MRT would have no deficiency on a peak day basis except in December, January, February and March. In each of those months, except February, cutting off the interruptible industrials and resales—(priority interruptible) would eliminate the deficiency. In February there would be a minor curtailment to firm industrials. On a monthly basis there would be a deficiency in November, December, January, February and March, but by curtailing the interruptibles it would be eliminated except in January and February when firm industrials would have to be curtailed. Therefore, Arkla says, sales to MRT should not be converted from an if, as, and when basis to a firm basis.

27. Staff argues that deliveries to MRT should not be placed in Category D, at least not all of them. Staff refers to the contract as not obligating Arkla to deliver any volumes to MRT, and points out that, in any case, MRT has additional sources of supply and that the Arkla gas does not necessarily go to the priority interruptible service to serve human needs customers. It should be noted that MRT does not show how the priority interruptible resale gas is actually distributed among human needs customers.

28. Laclede, as a customer, of MRT, objects to Arkla's assertion that end-use has not been a criterion in its curtailment program (Arkla, Brief on Exceptions, p. 33). Laclede also argues against Arkla and the Staff classifying deliveries to MRT on the basis of a contract label, and asserts that the Arkla gas is needed for MRT's priority interruptible sales.

It notes that during the period MRT buys gas from Arkla, the interruptible customers on MRT's system are not supplied with gas for their operations except to the extent of 1 percent for plot lights, etc.

(4921)

29. MRT receives gas under different conditions than Cities, which uses Arkla's gas for a large part of its load. MRT uses Arkla gas to serve interruptible customers as evidenced in part by its contract with Arkla. Thus, contrary to the Administrative Law Judge, MRT may properly be treated differently than Cities. Nevertheless, the use made by MRT of the Arkla gas does not irrevocably require that all of it should be placed in Category I, for end-use must be taken into consideration. As previously noted with respect to Cities, MRT can seek exemption from curtailment of its interruptible purchases to the extent necessary to protect high priority needs service by application under paragraph 49, *infra*.

30. *The Large Direct Sale Customers*—Assuming the Commission has jurisdiction which AP&L denies, it objects to being placed in Category A. It cites testimony that it had made a survey of its customers and found that 58 percent of its 1970 energy requirements constituted human needs customers and that 94 percent of its generation is dependent on Arkla gas (Tr. 1103, 1115-1116; Ex. 41). To burn oil continuously according to the testimony of AP&L's Vice President, J. D. Phillips, would damage the boilers and would create fuel procurement and handling difficulties, conversion would require an investment of $13,740,000 but this does not take into account the cost of air pollution equipment or the additional expenses of burning oil (Tr. 1104, 1109). It argues that it cannot rely on interconnected systems for additional power, for they have similar problems. It objects to Arkla's husbanding program. Alleging past discrimination, it urges that, in case of curtailment, Arkla be required to report to its customers.

31. However, on cross-examination witness Phillips agreed that AP&L by a process called "split firing" could operate

4922

those units which have soot blowers continuously using a 50 percent combination of oil and gas while those units that do not have soot blowers could operate continuously using 45 percent gas with 35 percent oil. He noted that the units that have soot blowers have altogether a capacity of 492 megawatts or approximately one-fifth of the company's generating capacity (Tr. 1397). However, he admitted that two units at the Ritchie plant, although they do not have soot burning equipment, could run for a month or more on oil with some loss of capacity but this could be restored by the use of gas (Tr. 1401-1402). He would not admit that burning oil continuously in AP&L's plants would not result in problems, *i.e.*, additional maintenance, and loss of capacity and efficiency (Tr. 1404), and insisted that to have an operating system equivalent to that using 100 percent gas would require the capital expenditures mentioned above.[8]

4923

32. SWEPCO makes similar arguments. It points out that on the basis of its Form 1 (Item G) covering the year 1970 it had an average of residential customers of 218,197 out of a total number of 254,858 and supplied them with approximately 1.5 billon Kwh out of a total of approximately 4.5 billion Kwh. It also takes strong exception to Arkla's husbanding program as forcing it to curtail in summer and helping it very little in winter.

33. Continental, which is largely concerned with Commission jurisdiction, generally does not object to Arkla's curtailment plan, does object to favoring the resale cus-

---

[8] By a filing of December 22, 1971, AP&L asks that a statement made by General Motors Corporation, not a party to this proceeding, referring to GM's testimony in *Panhandle Eastern Pipeline Company*, Docket No. PR71-119, be disregarded. Since this testimony is not part of the record here, it should be disregarded.

tomers, and considers Arkla's husbanding program as unwarranted and unreasonable.

34. The City of Ruston, Louisiana, in Category A which owns and operates an electric generating system in the City, purchases all of the gas for the operation of its generating plant from Arkla. Twenty-seven percent of its revenues are industrial; the remainder are residential and commercial. It urges that the Administrative Law Judge's decision be affirmed. If not, it asks that it be placed in Category C. If the classifications are revised, it argues that the modifications be made along human needs lines.

35. Arkla, specifically with respect to AP&L, argues that there should be no relief for the human needs customers and that the company is in no danger of having its supply of electric energy curtailed.

36. Contra to AP&L, the Staff argues, referring to the Phillips testimony discussed above, that more than 50 percent of AP&L's steam generating capacity can operate by using fuel oil. Staff objects to a plan proposed by witness Phillips by which 42 percent of the gas delivered by Arkla would be considered in Categories A and B and 58 percent in C and D (see (Tr. 1367). Staff says that adoption of this alternative would result in a burden on industries that cannot use an alternate fuel. Staff computes that, assuming a 42 percent curtailment of AP&L's requirements, a ratable curtailment of all large customers would require almost complete curtailment of Arkla's customers in

Category B. Staff also contends that classification of AP&L's load wholly within A is further justified because of AP&L's ability to obtain energy from outside its system. Staff takes a similar position of SWEPCO pointing out that it put in no evidence except its Forms 1 and 12,

and did not show that it could not convert to an alternative fuel. We agree with Arkla's categorization of service for boiler fuel for electric generation, for the reasons hereinafter stated.

Desirability of an Agreed Plan

37. The Commission is aware of the severe economic dislocations which curtailment can cause. We have in the past approved settlements of curtailment proceedings which reflected a public-interest resolution of the issues there involved.[9] We encourage the amicable resolution of curtailment cases, but we are now convinced that the public interest is served by our establishment of standards to be applied in approving curtailment plans for all pipelines. Absent extraordinary circumstances, the basic priorities set forth by Arkla, as modified herein, should be observed.[10]

A Curtailment Plan for Arkla

38. After a full and complete hearing the matter is before us for resolution. We find Arkla's tariff sheets which comprize its curtailment plan to be just and reasonable, when modified as hereafter ordered.

39. We conceive it to be necessary in order to discharge our responsibility of consumer protection to look beyond the contracts between Arkla and its customers to the end use of gas delivered by Arkla. We must seek the highest and best use of the limited supply available.

---

[9] *Transcontinental Gas Pipe Line Corporation*, —— FPC ——, Docket No. RP 72-99, issued November 15, 1972; *Columbia Gas Transmission Corporation*, —— FPC ——, Docket No. RP72-89, issued September 29, 1972; *Northern Natural Gas Company*, —— FPC ——, Docket No. RP71-107, October 2, 1972.

[10] Docket No. R-467, Utilization and Conservation of Natural Resources—Natural Gas, Notice of Policy Statement issued January 8, 1973.

40. Arkla should, therefore, file revised tariff sheets, which will meet the basic objectives of protecting deliveries for residential and small volume commercial consumers who cannot be safely curtailed on a daily basis and requiring, as the initial level of curtailment, reduction in deliveries for large volume interruptible sales. The tariff sheets should provide that, in case of curtailment, the following priorities will be observed:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day).

Priority 2. Large commercial requirements (50 Mcf or more on a peak day) and industrial requirements for plant protection, feedstock and process needs.

Priority 3. All industrial requirements not specified in Priorities 2, 4, 5, 6, 7 or 8.

Priority 4. Firm industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

Priority 5. Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler fuel use where alternate fuel capabilities can meet such requirements.

Priority 6. Interruptible requirements of less than 1,500 Mcf per day.

Priority 7. Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day).

Priority 8. Interruptible requirements of more than 3,000 Mcf per day).

41. Arkla's revised filing should insure that each higher priority of use is fully protected from curtailment until all lower priorities have been curtailed 100 percent; that is, no curtailments of Priority 7 uses will be effected until all

Priority 8 deliveries have ceased, no curtailment of Priority 6 uses will be effected until all Priority 7 deliveries have ceased, and so forth. In applying these curtailment priorities, Arkla's separate disconnected systems should be treated individually at this time and curtailment need not be uniform among these separate systems.[11]

42. If system deliverability permits only partial delivery of gas to a given category of use, curtailment will be effected on the basis of a pro rata sharing based on historical deliveries to customers for that category. Historical takes will be calculated on the basis of a 3-year average taken from the 3-year period ending September 30, 1971, which is prior to the implementation of the filed curtailment plan on October 15, 1971. On days when curtailment is required, total deliveries to individual customers may not exceed contract volumes.

43. In order to prevent discrimination between pipeline and distribution customers, and to insure proper allocation of available gas to end uses in the order of priorities, it will be necessary for Arkla's curtailment plan to categorize end use on an aggregated basis; that is, when Arkla curtails Priority 8, it must curtail not only the volumes it delivers to its direct sales customers for Priority 8 use but it must also curtail deliveries to resale customers of volumes equivalent to the resale customers' sales for Priority 8 use.

---

[11] At such time as the Arkla systems become interconnected, a uniform system of curtailment may be necessary. This will be determined in the appropriate proceeding.

(4926)

44. Our decision to require observance of the priorities stated above has not been lightly reached. We are impelled to direct curtailment on the basis of end use rather than on the basis of contract simply because contracts do not necessarily serve the public interest requirement of efficient allocation of this wasting resource. In time of shortage, performance of a firm contract to deliver gas for an inferior use, at the expense of reduced deliveries for priority uses, is not compatible with consumer protection.

4927

45. Secondly, we have determined that interruptible sales [12] are for the most part, predicated on end-use considerations; those customers, be they direct sales or indirect sales, who require gas for human needs service or non-substitutable industrial service do not contract on an interruptible basis. Interruptible service, at the lower rates charged for such service, envisions interruption. And accordingly, interruptible customers can most reasonably be expected to have alternate fuel facilities already operational. We conclude, therefore, that curtailment should first fall on those who have not historically borne the full-fixed costs of providing gas service, particularly since these customers are best prepared to accept interruptions in service and clearly do not require uninterrupted service for protection of life or property.[13]

---

[12] The term "interruptible sales" is usually understood to mean sales at sellers' option. The Cities Service contracts, though termed "interruptible" do not fit this definition and it is for that reason, among others, that we acknowledge in paragraph 23 *supra*, that all service to Cities cannot properly be classified as interruptible.

[13] In any situation where irreparable injury to life or property will occur because of unusual or special circumstances, the affected customer should take appropriate action under the provisions of paragraph 49, *infra*, to insure that high priority end uses presently served on an interruptible basis are properly protected. MRT's particular problems, noted in paragraphs 24-29, *supra*, should be so accommodated.

46. Finally, if curtailment reaches beyond the level of interruptible service into firm contract service, we commit ourselves to the proposition that large volume boiler fuel usage is inferior and should be curtailed before other firm service. Aside from the established physical fact that combustion of natural gas for raising steam in boilers and its subsequent conversion into electricity or mechanical energy results in a loss of roughly two-thirds of the heating value of the gas used—which we regard as unacceptably inefficient in times of shortage—we note also that those who use gas as boiler fuel generally can substitute other fuels more readily and at lower overall cost than other gas users; additionally, pollu-

tion control is more practical because of the large size of individual installations. Other fuels generally can be physically substituted in large boiler fuel applications with less inconvenience and less possible adverse consequences than in other industrial applications, such as direct fired uses, and other uses demanding precise temperature control, flame characteristics, instantaneous response and atmosphere quality. Finally, subordinating boiler fuel use with its comparative ease of substitutability, to other large scale industrial and commercial uses should tend to minimize plant and business closings and the attendant economic loss from decreased production and payrolls, and the personal hardships of unemployment.

47. Arkla's curtailment plan must reflect sufficient flexibility to permit immediate response by Arkla to emergency situations during curtailment where supplemental deliveries are required to forestall irreparable injury to life or property. Revised tariff provisions to define and delimit emergency procedures should be filed for Commission review and approval.

(4928)

EVIDENCE TO PROVIDE BASIS FOR IMPLEMENTATION

48. The determination of specific volumes to which Arkla's customers, both direct and resale, are entitled in times of curtailment will necessarily be made only after a determination of Arkla's present and historical end-use delivery patterns. In order to facilitate making such a determination the latest market data available should be presented. We recognize that Arkla does not have sufficient information to provide a complete record on these matters, and that information from Arkla's customers is badly needed. Accordingly, we will hold this docket open to provide the necessary forum for record determination of end-use categorization of the gas volumes moving through Arkla's system; we invite detailed submission by Arkla's customers so that end-use determinations can be made as accurately as possible. In the event any of Arkla's customers decide not to avail themselves of this opportunity to provide evidentiary support for the entitlement of volumes to be delivered to each in times of curtailment, we direct Arkla to reconstruct the end-use data for each non-participating customer on the basis of available information with Arkla's determination being subject to Staff verification.

4929

49. Any customer which seeks individualized consideration of its allocated percentage may assume the burden of establishing its need for an exception from Arkla's classification or proposed curtailment percentage, and of establishing the volume of gas needed for service; such presentation shall be made in this docket and determined herein.

50. We recognize also that exceptions from Arkla's proposed levels of curtailment may be required by particular environmental problems of air quality or the like. Any customer seeking individualized treatment of its gas needs on

this basis shall have the burden of establishing the nature and extent of its problem and the volume of gas needed to avoid hazard to human health.

ARKLA'S HUSBANDING PROGRAM

51. AP&L, SWEPCO and Continental oppose Arkla's husbanding program filed as part of its curtailment plan. Under the husbanding program Arkla reduces field supply withdrawals in summer months thereby providing a higher daily capability in November through March. Arkla states that the concept of husbanding provides a gas supply cushion in the winter period which reduces the danger of hardships on human needs customers. Arkla explains that such husbanding has a cumulative effect when withdrawals are reduced for more than one year. The effect of husbanding on Arkla's customers is to substantially decrease deliveries for industrial consumption in order to gain additional winter deliverability.

52. Those opposing argue that the winter benefits are minimal compared with the very much larger curtailments which result in the summer than if there were no husbanding program. This effect, according to the record, results from the mechanics of the reservoir supply sources. Arkla replies that the opposing arguments ignore the fact that Arkla must take steps to try to preserve presently existing reserves for human needs customers for the longest possible time until a major new source is available, and to insure that it will not fail to serve a town in winter with resulting human hardship. While it will not deliver in winter the same amount of gas husbanded in the preceding summer, the gas is not lost but its delivery is deferred.

4930

53. In our opinion the husbanding program is highly desirable and consistent with Arkla's intention to provide maximum service reliability for human needs customers

during winter periods when their peak demands are experienced. Although the absolute necessity for husbanding cannot be mathematically demonstrated in all cases, the overall concept of conserving deliverability by reducing summer withdrawals from gas supply sources to provide a supply contingency for winter periods serves the general public interest at a time when gas supplies are critically short. The fact that the husbanding program will tend to shift available gas from consumption by large volume boiler fuel users and other industrial consumers to residential and commercial consumers during the winter is in accord with present Commission policy. *See El Paso Natural Gas Co.*, — FPC —, Opinion No. 600-A, Docket Nos. RP64-6 and RP70-11, issued May 8, 1972.

SPECIAL TERMS OF ARKLA'S CURTAILMENT PLAN

54. Arkla's curtailment plan also provides in paragraph (b) that seller shall be relieved of all liabilities for failure to deliver the quantities of gas called for by contracts. The Administrative Law Judge finds that Arkla by this paragraph seeks to absolve itself from all liabilities even though it may not apply the tariff uniformly. With such a paragraph, he says, the Commission and the courts will be powerless to determine if a violation of the tariff has occurred. We held in *United Gas Pipe Line Company*, Opinion No. 606, Docket Nos. RP71-29, *et al.*, that no liability arises out of curtailment adherence to a Commission-approved plan, and that no tariff provisions so stating are necessary.

56. Arkla's operations have been conducted in conformity with its currently effective tariff provisions, and no undue discrimination or preference among customers has resulted. We find that curtailments heretofore effected, and those which will ensue until the revised tariff sheets we here require become effective, have been and will be undertaken pursuant to lawful tariff provisions which are just and reasonable.

The Commission Further Finds:

(1) Arkla is a natural gas company subject to the jurisdiction of the Commission.

(2) The curtailment plan in the form of a tariff change, filed by Arkla, including the curtailment of sales to direct customers, is subject to the jurisdiction of the Commission.

(3) The curtailment plan filed by Arkla as here modified and limited does not involve an abandonment of service of Arkla and is just and reasonable.

The Commission Orders:

(A) Within 60 days of the issuance of this opinion and order, Arkla shall file revised tariff sheets modifying the curtailment plan proposed in these proceedings. The revised tariff sheets shall provide for curtailments on the basis of the priorities set forth in this opinion, shall define and delimit emergency procedures, and be otherwise in accordance with this opinion and order, and *shall become effective upon Commission order accepting the same.*

(B) Until the revised tariff sheets required in paragraph (A) become effective, Arkla shall continue such curtailments as are necessary in accordance with its presently effective tariffs.

(C) This docket shall remain open for the purpose of determining the specific volumes to which Arkla's customers, both direct and resale, are entitled in times of curtailment based upon end-use in accordance with this opinion and order, and for the purpose of determining the necessity for individualized treatment of the gas needs of any customer because of particular environmental problems or other reasons.

(D) Exceptions not granted are denied.

By the Commission. KENNETH F. PLUMB,
(SEAL) *Secretary.*

(5009) APPENDIX D

5009

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 643-A

Docket No. RP71-122

Arkansas Louisiana Gas Company

Opinion and Order on Rehearing

Issued: April 10, 1973

5010

• • • • • • • • • • •

MOODY, Commissioner:

1. Arkansas Power & Light Company (AP&L) and the City of Ruston, Louisiana, on February 7, 1973, have filed applications for rehearing with respect to the Commission's Opinion No. 643 and order issued January 8, 1973. On March 9, 1973, the Commission granted rehearing for purposes of further consideration and granted intervention to General Motors Corporation (GM).

2. In Opinion No. 643 and order we examined the curtailment plan filed by Arkla, prescribed a revised curtailment plan setting forth the order in which various types of gas service should be curtailed in the form of eight priorities, ordered that Arkla file revised tariff sheets providing for curtailments on the basis of the prescribed priorities, and provided that the docket should remain open for the purpose of determining the specific volumes to which Arkla's customers are entitled and for the purpose of determining the necessity for individualized treatment of the gas needs of any customers because of particular environmental problems or other reasons.

3. Both AP&L and Ruston argue that all of the gas delivered to them should not be given a low priority simply because they use gas for boiler fuel in their power plants, for part of the electric energy they generate is used by human needs or domestic customers. AP&L says that the Commission has, in effect placed service to its generating plants in Priority 5, which is the lowest priority except for the interruptible categories. Ruston assumes that service to it is classified in Priority No. 8, which is the lowest category of all. We have not, nor are we here, determining the precise classification of each of Arkla's customers. Whether particular sales are interruptible or firm should be viewed in the light of our discussion below.

4. In Opinion No. 643 we committed ourselves to the proposition that large volume boiler fuel usage is inferior and should be curtailed before other service. We noted, among other things, that conversion of the energy from natural gas to electric power results in a loss of about two-thirds of the heating value of the gas used. This is largely because of the loss of heat in the power plant stacks and the energy lost in condensing the steam after it has passed through the turbines. We took notice of this as an established physical fact. AP&L questions our right to do so, arguing that if we are to do so, we should take similar notice that electric appliances have an extremely high record of efficiency in use as opposed to gas appliances. AP&L also points to the advantage of heat pumps supplying more heat than the electrical input. There is nothing to show that the greater efficiency of electrical appliances, of which we are willing to take notice for the limited purpose of considering AP&L's motion for rehearing, is sufficient to overcome losses in generation.

5. However, as we indicated in Opinion No. 643 (par. 47) Arkla's curtailment plan must reflect sufficient flexi-

(5011)

bility to permit response to emergency situations. Furthermore, the docket is open to consider the necessity for individualized treatment of the gas needs of any customer. We are aware of the extreme importance of electric power for domestic, commercial and industrial consumers. Also we note that the loss of power to domestic consumers would prevent their using gas for central heating purposes. Therefore, we shall provide that Arkla shall

5012

include in its plan an emergency exemption, which will apply where supplemental deliveries are required to forestall irreparable injury to life or property and, as in *United Gas Pipe Line Co.*, — FPC —, Opinion No. 647, Docket Nos. RP71-29, RP71-120, issued January 12, 1973, where shedding of firm electric load by power plants is threatened. As in *United*, we believe that such a procedure will implement our policy of according a low priority to boiler fuel gas, while at the same time maintaining the integrity of electric service, pending alternative arrangements.

6. AP&L further contends that we erred in establishing historical use rather than historical requirements as the basis for partial curtailments within a given category. We provided that curtailments will be effected on the basis of a pro rata sharing based on historical takes during the three-year period ending September 30, 1971, which was prior to the implementation of Arkla's curtailment plan on October 15, 1971. AP&L argues that the effect of using actual takes as opposed to actual requirements is to create a multiplier effect which piles curtailments on curtailments, that the record shows that Arkla made curtailments during the base period, and that AP&L suffered curtailments substantially larger than Arkla's other customers.

7. By historical requirements AP&L appears to mean contractual requirements, for there is no other practicable

means of measuring requirements for such a past period. Contractual requirements obviously could be used as a basis for curtailments, but in our opinion it is more equitable and desirable that curtailments reflect actual use. Actual use is, on balance, more indicative of customers needs than are contractual provisions. We realize that during the three-year period in question Arkla made curtailments to its customers, and these curtailments may have reflected contractual entitlements. However, to avoid all curtailments in the base period, it would have been necessary to use a period somewhat earlier and therefore more remote from present operations of Arkla. We chose the three-year period ending September 30, 1971, as avoiding the operation of curtailments under Arkla's plan during the winter of 1971-1972 but more likely to reflect present needs as reflected in actual use than an earlier period.

5013

8. AP&L continues by saying that the Commission erred in retroactively applying the curtailment priorities set forth in its Order No. 467, issued January 8, 1973, the same date as Opinion No. 643. The priorities prescribed in Opinion No. 643 were based on the record in this proceeding after briefs, a decision of an Administrative Law Judge, exceptions, briefs opposing exceptions and consideration by this Commission. Unlike proceedings involving rate increases where Commission orders, if they find the rates excessive, are usually retroactive where there has been suspension, the curtailment plan prescribed here will only apply prospectively to Arkla, and it is subject to possible further proceedings relating to end-use and individualized treatment. Parties to Docket No. RP71-122 were aware of the importance of end-use as a curtailment criterion since the Staff so argued.

9. AP&L further contends that the Commission erred in not requiring Arkla to file periodic and detailed reports on

(5013)

implementation of its plan. We shall include the same requirements we made in the case of United in Opinion No. 647.

10. Finally, AP&L argues that the Commission erred in holding that Mississippi River Transmission Corporation (MRT) is entitled to receive any Arkla gas. We indicated in Opinion No. 643 that even though MRT is an interruptible customer it might take appropriate action to procure an exception from Arkla's classification or proposed curtailment percentage where irreparable injury to life or property might occur because of unusual or special circumstances. AP&L says that MRT's only right to receive gas is based on a contract providing for delivery of "such gas as seller is agreeable to selling and buyer is agreeable to buying". Thus, it contends that MRT has no right to receive any gas from Arkla,[1] and we have no jurisdiction to direct Arkla to deliver gas to MRT.

5014

11. We are of the opinion that AP&L is mistaken on the law. It has been held that we have authority to order curtailment of sales to direct sale customers. *F.P.C.* v. *Louisiana Power & Light Co.*, — U.S. —, 92 S.Ct. 1198 (1972). As the Court says, the Commission has authority over transportation and has broad powers to devise effective means of meeting its responsibilities. In this proceeding we suspended Arkla's tariff filing which provided a curtailment and we are therefore proceeding, as in *Louisiana Power & Light*, under Section 4 of the Gas Act which prohibits any "undue preference or advantage" or any "un-

---

[1] AP&L adds that it resents the diversion of gas by "fiat" of the Commission to others who are not so entitled. We should point out that we do not operate by "fiat", if by this is meant a purely arbitrary order; we arrive at conclusions, rightly or wrongly, as we see the public interest in the light of the law and the record in the case.

reasonable difference" in service. Furthermore, under Section 4 we have authority to employ our powers under Section 5, including the power to determine the just and reasonable classification, practice, or contract to be observed. While Arkla's contract with MRT provides for interruptible service, a curtailment plan which would prevent MRT from receiving any gas, even for residential service, while the boiler fuel users receive gas is discriminatory and unjust and unreasonable. As Opinion No. 643 explains, we must look beyond the contracts between Arkla and its customers to the end-use of gas.

12. GM applauds the Commission's decision to establish curtailment priorities but submits that the Commission erred in introducing the "firm"-"interruptible" distinction into the order of priorities set forth in Opinion No. 643. Furthermore, it believes that the Commission's conclusion that "interruptible sales are for the most part, predicated on end-use considerations" and that those customers who require gas for "non-substitutable industrial service do not contract on an interruptible basis" is not founded on fact. GM contends that the distinction between "firm" and "interruptible" varies in usage, would lead to litigation, and should be eliminated or, at least, "interruptible" should be confined to seller's option contracts like those between Arkla and MRT or the Ideal Cement Company.

13. We agree with GM that the term "interruptible" has a widely varying meaning and should be defined. Other terms used in Opinion No. 643 also require definition and we therefore incorporate the following set of definitions into this opinion:

5015

Residential: Service to customers which consists of direct natural gas usage in a residential dwelling for space

(5015)

heating, air conditioning, cooking, water heating, and other residential uses.

Commercial: Service to customers engaged primarily in the sale of goods or services including institutions and local and federal government agencies for uses other than those involving manufacturing or electric power generation.

Industrial: Service to customers engaged primarily in a process which creates or changes raw or unfinished materials into another form or product including the generation of electric power.

Firm Service: Service from schedules or contracts under which seller is expressly obligated to deliver specific volumes within a given time period and which anticipates no interruptions, but which may permit unexpected interruption in case the supply to higher priority customers is threatened.

Interruptible Service: Service from schedules or contracts under which seller is not expressly obligated to deliver specific volumes within a given time period, and which anticipates and permits interruption on short notice, or service under schedules or contracts which expressly or impliedly require installation of alternate fuel capability.

Plant Protection Gas: Is defined as minimum volumes required to prevent physical harm to the plant facilities or danger to plant personnel when such protection cannot be afforded through the use of an alternate fuel. This includes the protection of such material in process as would otherwise be destroyed, but shall not include deliveries required to maintain plant production.

Feedstock Gas: Is defined as gas used for its chemical properties, as a raw material in creating an end product.

Process Gas: Is defined as gas use for which alternate fuels are not technically feasible such as in applications requiring precise temperature controls and precise flame characteristics.

5016

Boiler Fuel: Is considered to be natural gas used as a fuel for the generation of steam or electricity, including the utilization of gas turbines for the generation of electricity.

Alternate Fuel Capabilities: Is defined as a situation where an alternate fuel could have been utilized whether or not the facilities for such use have actually been installed.

14. Upon further consideration of the priority categories set forth in Opinion No. 643 in the light of the applications for rehearing we are of the opinion that certain changes should be made. In Category 2 we shall insert "firm" before "industrial requirements for plant protection, feedstock and process needs". We do this because we believe that the distinction between firm and interruptible users should be retained and interruptible users, who must rely on alternate fuel capabilities or be able to cease receiving gas, should not be placed in as high a category as Category 2. To this category we add "pipeline customer storage injection requirements" because storage gas, although accumulated during the summer, is used to meet the peak demand of winter of high priority customers including residential and small commercial customers, and should be protected on a high priority basis.

15. We have modified Category 6 covering interruptible requirements up to 1,500 Mcf per day to exclude requirements of 300 Mcf per day or less. These interruptible requirements would therefore automatically fall into Category 3, which covers industrial requirements not specified in other categories. This change will avoid unnecessary

and burdensome data gathering on the part of Arkla without depriving the higher priorities of significant amounts of gas. To Category 6, as well as to Categories 7, 8 and 9, we have added the qualification, "where alternate fuel capabilities can meet such requirements". In this period of transition from the era of plentiful gas supply, which has now ended, to a time of shortage and curtailment, interruptibles by definition can be as important to the economy as firm sales; curtailment of such interruptibles should not be automatic as to deny service to a user who can make no other fuel arrangement. Accordingly, curtailment as provided herein in Priorities 6, 7, 8 and 9 affects interruptible requirements where alternate

fuel capability can meet such requirements. An interruptible user who is without alternate fuel capability will be included in Priority 3. It may be noted that the expression "alternate fuel capabilities" by definition includes the situation where an alternate fuel could have been utilized, whether or not the facilities have actually been installed. This avoids penalizing those why have had the foresight to install such facilities.

16. We have inserted a new category, now Category 8, to cover interruptible requirements of more than 3,000 Mcf per day but less than 10,000 Mcf per day. This will place the largest interruptible users in the lowest priority where we think they should appropriately be. These users clearly can utilize alternate fuels at a lower per unit cost of conversion than smaller users; conversion on this scale by a few can be accomplished more easily and with less economic impact than if conversion were forced on many. Pollution abatement and control is simplified when a relatively few large units are affected than if many smaller units switched from gas to a more polluting fuel.

5018

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the applications for rehearing filed by AP&L, Ruston and GM present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 643 and Order except as set forth in the discussion above and the ordering clauses below.

The Commission orders:

(A) Opinion No. 643 and Order is confirmed as the decision of the Commission and shall remain in full force and effect except as modified herein.

(B) Arkla shall observe the following priority-of-service categories during periods of curtailed deliveries to its jurisdictional customers:

(1) Residential, small commercial (less than 50 Mcf on a peak day).

(2) Large commercial requirements (50 Mcf or more on a peak day), firm industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements.

(3) All industrial requirements not specified in (2), (4), (5), (6), (7), (8), or (9).

(4) Firm industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(5) Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler fuel use where alternate fuel capabilities can meet such requirements.

(5018)

(6) Interruptible requirements of more than 300 Mcf per day, but less than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

5019

(7) Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day), where alternate fuel capabilities can meet such requirements.

(8) Interruptible requirements of more than 3,000 Mcf per day, but less than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.

(9) Interruptible requirements of more than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.

The priorities-of-deliveries set forth above will be applied to Arkla's deliveries during periods of curtailment on its system; except, however, that, upon a finding of extraordinary circumstances after hearing initiated by a petition filed under Section 1.7(b) of the Commission's Rules of Practice and Procedure, exceptions to those priorities may be permitted.

The above list of priorities requires the full curtailment of the lower priority category volumes to be accomplished before curtailment of any higher priority volumes is commenced. Additionally, the above list requires both the direct and indirect customers of the pipeline that use gas for similar purposes to be placed in the same category of priority.

(C) Within 30 days of the issuance of this Opinion No. 643-A and Order Arkla shall file amended tariff sheets to carry into effect the amended priorities and procedures set forth in (C) above, superseding tariff sheets filed in ac-

cordance with paragraph (A) of our order of January 8, 1973.

The tariff shall also contain provisions that will reflect sufficient flexibility to permit Arkla to respond to emergency situations (including environmental emergencies) during periods of curtailment where supplemental deliveries are required to forestall irreparable injury to life or property.

5020

In addition the tariff shall contain an emergency exemption from curtailment for all electric utility customers to the extent required to avoid the shedding of firm electric load upon an attestation by a utility to Arkla that; (1) the utility faces an emergency situation wherein it will be required to shed firm electric load unless an exemption from curtailment is granted in an amount which will avoid shedding of load; (2) the utility has no alternate fuel capability; (3) the utility has exhausted all purchased power opportunities; (4) the utility has utilized all alternative sources of power; and (5) the utility will accept reduced deliveries, as soon as possible thereafter, to offset the volumes taken during the emergency exemption from curtailment.

(D) Arkla shall (1) make monthly reports to the Commission on the nature and extent of its curtailments during the preceding month, effective as of the date of this order, and (2) file a report, within 60 days of the issuance of this order, of base requirements for all its customers consistent with the findings herein.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

(5056)

APPENDIX E

5056

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 643-B

Docket No. RP71-122

ARKANSAS LOUISIANA GAS COMPANY

Opinion and Order Denying Rehearing and Granting Extension of Time

Issued: June 8, 1973

5057

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

Docket No. RP71-122

ARKANSAS LOUISIANA GAS COMPANY

OPINION No. 643-B

OPINION AND ORDER DENYING REHEARING AND GRANTING EXTENSION OF TIME

(Issued June 8, 1973)

MOODY, Commissioner:

Arkansas Louisiana Gas Company (Arkla) on May 10, 1973, filed an application for rehearing of the Commission's Opinion No. 643-A and order issued April 10, 1973, or, if the application is denied, for an extension of time within which to file the amended tariff sheets referred to in Ordering Paragraph (C) and the report of base customer requirements referred to in Paragraph (D). In Opinion

No. 643-A and order the Commission, among other things, amended the schedule of priorities provided in Opinion No. 643, — FPC —, issued January 8, 1973, and included a series of definitions of terms used in prescribing the priorities.

After describing its system as making only a few sales for resale but many direct sales to residential, commercial and industrial customers, all as supported by the record, Arkla urges that its operations are not typical of pipelines whose gas is distributed by other companies. We agree that, in this respect, Arkla is different from many other pipelines and that the impact of any system of priorities must be considered with this in mind, but we are of the opinion that Arkla has not shown that the definitions included and the priorities amended by Opinion No. 643-A and order are not appropriate for its system.

5058

It should be observed that under the Natural Gas Act as interpreted by *F.P.C.* v. *Louisiana Power & Light Co.*, — U.S. —, 1972, we have authority over curtailment through our jurisdiction over the transportation of natural gas in interstate commerce. We do not regulate "the local distribution of natural gas" (Section 1(B), Natural Gas Act). Therefore, our curtailment priorities specified in Opinion No. 643-A apply to Arkla's sales for resale and, where there is no sale for resale, up to the point where local distribution begins. We do not undertake to order how gas is actually allocated on the distribution systems of Arkla or its customers.

THE DEFINITIONS

Arkla would enlarge the definition of "Firm Service" to include service which may be interrupted during "spike peak" periods, that is periods of short duration in which demand is sharply increased, as well as during periods

(5058)

when the supply to higher priority customers is threatened, as the definition now provides. Arkla says that if curtailment during "spike peaks" were to convert firm service to interruptible service, then there would be no such thing as firm industrial service. In our opinion Arkla's suggestion is not appropriate and leaves the definition subject to doubt. As the definition now reads, if the contract or rate schedule provides that the service to the firm customer in question may be interrupted for the benefit of higher priority customers, that is still firm service, and, in any case, that would be the effect of the schedule of priorities. To add that interruption may be made during a spike peak introduces an element of doubt as to what kind of spike is intended and does not seem necessary, for the firm customer may be interrupted, in any case, to protect the higher categories.

Arkla would modify the definition of interruptible service to confine it to service under which the seller is not expressly obligated to deliver specific volumes within a given period and would state that service "at seller's option" or on an "as and if available or mutually agreeable" basis is interruptible. It would leave out the present provision that service is interruptible if the contract or schedule expressly or impliedly requires installation of alternate fuel capability, pointing out that a firm service industrial customer might make provision for an alternate fuel.

5059

We find no reason to change the definition. If a firm customer makes provision for alternate fuel, that may be its choice, but that would not make service to it interruptible. We classify as interruptible those customers whose contracts or rate schedules provide, among other things, for alternate fuel. Arkla is incorrect when it says that with respect to interruptible categories we make no distinctions

on the basis of end use. We have determined in Opinion No. 643, that interruptible sales are predicated on end use considerations, inasmuch as those customers, whether under direct or indirect sales, who require gas for human needs service do not normally contract on an interruptible basis.

Arkla would modify the definitions of "Plant Protection Gas" and "Process Gas" by deleting qualifications that alternate fuels are not feasible. In the case of Plant Protection Gas, Arkla argues that the qualification makes the definition administratively impracticable because it will apply to a large number of customers, many of whom will use small volumes of gas. Plant Protection and Process Gas is placed in the second priority category even though most other industrial gas is placed in lower categories. Therefore it is highly important to confine this gas to situations where it is essential and not permit its use where an alternate fuel is possible.

We agree that the definition of "Feedstock Gas" should be clarified to read as it does in the erratum notice of April 11, 1973, in Docket No. R-474:

> "*Feedstock Gas:* Is defined as natural gas used as a raw material for its chemical properties in creating an end product."

It should be observed that the definitions prescribed in Opinion No. 643-A are those set forth in the Notice of Proposed Rulemaking and Request for Comments in Docket No. R-474 issued March 26, 1973, as amended by the erratum notice. In Docket No. R-474 it is proposed that the definitions be used in considering curtailment and certificate matters coming within the context of Docket Nos. R-467, R-468 and R-469. For the sake of uniformity it would be desirable that any changes in the definitions there made would be applied to Arkla. Therefore we shall leave open the present docket so that any changes in the definitions, if

(5059)

appropriate to the Arkla system, may be made applicable after Arkla and other parties to this proceeding have had an opportunity to respond.

5060

THE PRIORITY CATEGORIES

Arkla would delete from Priority Categories 6, 7, 8 and 9 pertaining to interruptible requirements over 300 Mcf per day the qualification, "where alternate fuel capabilities can meet such requirements". Under the present schedule interruptible requirements, where alternate fuel capabilities cannot meet such requirements, would fall in Category 3. Arkla argues that gas for a large interruptible customer who cannot use alternate fuel, should not be moved all the way to Category 3. It adds that the gas shortage should not be permitted to result in a windfall in favor of one customer who elected to buy interruptible gas to the prejudice of another customer who elected to purchase firm service. For the purposes of priorities during periods of gas shortage we have determined to make end use the principal criterion rather than contract terms. We also determined that interruptible sales are for the most part predicated on end use considerations. When the use of alternate fuel is not possible we do not think such interruptible sales should be classified with interruptible sales where alternate fuel may be used.

Arkla argues that if the reference to alternate fuels are not deleted a new category should be established between Categories 5 and 6 to cover interruptible requirements where alternate fuel cannot be used. We see no reason to make a distinction between firm and interruptible requirements where alternate fuels are not possible; as a result, such interruptible requirements will fall into Category 3. Arkla is not correct that the priority categories do not cover interruptible requirements where alternate fuels are not possible.

Arkla objects to the Commission's placing interruptible requirements of 300 Mcf per day or less in Category 3 arguing that no interruptible requirement should be placed in any category higher than a category containing firm requirements, for, it argues again, an interruptible customer should not be preferred over a firm customer; instead, if firm service is available, it says, the customer should change to that service. We placed small interruptible customers in Category 3 in order to avoid unnecessary data gathering without depriving the higher categories of much loss of gas. As we said above, we are not basing our determinations of priorities on contract terms.

5061

Arkla takes exceptions to the language in Opinion No. 643-A which appears to anticipate the possibility that Mississippi River Transmission Corporation (MRT) may be able to obtain a priority which could have the effect of elevating this interruptible sale to the status of a firm commitment to the prejudice of Arkla's own customers. Of course, we are not here determining the amount of gas to be delivered to MRT and in what priority categories. This is to be determined upon the basis of the requirements of all its customers to be set forth in a report by Arkla required by Paragraph (D)(2) of the order in Opinion No. 643-A. However, the gas to be delivered to MRT will be measured by the end uses of the gas by MRT's customers as applied to the schedule of priorities. In no other way can we effect a fair allocation, giving due consideration to end use protection of high priority needs.

Arkla also objects to the insertion of pipeline storage injection requirements in Category 2. It suggests that the customer pipeline may use the storage gas for its industrial customers, that Arkla may have to supply the pipeline's residential customers twice over, or that Arkla may be

(5061)

given a credit against volumes it would otherwise have to deliver to serve its customer pipeline's residdential customers with the result that Arkla will have some of the benefit of the other pipeline's storage. Arkla would leave it up to the receiving company to inject gas into storage. In our opinion the availability of storage gas is a protection to the customers of the receiving pipeline as well as Arkla. The use of storage can be made possible and encouraged by granting a high priority to deliveries for this purpose. We believe it our responsibility to support the development of storage supplies for the benefit particularly of residential and commercial customers who require space-heating gas in the winter. Of course, we do not mean that Arkla should supply gas twice over to a customer with storage capability, and we do not believe the hypothetical circumstances presented by Arkla to be reasonable.

PROCEDURAL ISSUES

Arkla prays that if the Commission does not approve the curtailment plan filed on or about March 7, 1973, without the modifications in Opinion No. 643-A, then it requests a

5062

hearing on such modifications. Our determinations in Opinion No. 643-A and order were based on our knowledge of the Arkla system derived from the record in these proceedings and our knowledge of the present gas shortage. Arkla has had the opportunity to comment in this second application for rehearing and we do not believe that further hearing on the determinations here made would make any useful contribution. A hearing, of course, may be necessary on the application of the schedule of priorities to Arkla's sales as contemplated by Opinion No. 643 and order when we left the docket open for the purpose of determining the specific volumes to which Arkla's customers are entitled in times of curtailment. At Arkla's request we shall ex-

tend the time for making the filings required by Paragraphs (C) and (D) of the order attached to Opinion No. 643-A.

On May 25, 1973, Arkansas Power & Light Company (AP&L) filed a response to Arkla's application of May 10, 1973. AP&L contends that Arkla's pleading is not an application for rehearing but is a motion, to which a response is proper. We do not accept this construction of Arkla's filing of May 10, 1973. That filing is an application for rehearing properly addressed to Opinion No. 643-A, in which we modified some of the determinations made in Opinion No. 643. AP&L's filing must therefore be rejected as a response to Arkla's application of May 10, 1973, since Section 1.34 of our Rules does not permit a response to an application for rehearing. As Opinion No. 643-A was issued April 10, 1973, AP&L's filing of May 25, 1973, is not timely as an application for rehearing under Section 19 of the Natural Gas Act and must be rejected as such.

Insofar as AP&L's filing contests determinations made in Opinion No. 643 or 643-A we shall accept it as an application for reconsideration. However, the arguments made by AP&L were largely made by it in its application for rehearing of Opinion No. 643 or by Arkla in connection with Opinion No. 643-A. The issues raised have been covered in the two opinions or in the present order and do not require further discussion.

Insofar as AP&L's filing is directed at Arkla's tariff filing of March 7, 1973, which Arkla is to modify in accordance with Ordering Paragraph (C) in the order attached to

Opinion No. 643-A and Ordering Paragraph (B) of the present order, we shall retain the filing as a comment on Arkla's tariff filing of March 7, 1973, and shall consider it in connection with the modified tariff to be filed by Arkla.

(5063)

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed by Arkla present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 643-A and Order with the exception of the definition of "Feedstock Gas", subject to the discussion above and the ordering clauses below.

The Commission orders:

(A) Arkla's application for rehearing with respect to Opinion No. 643-A and Order is denied except for the discussion above and the ordering clauses below.

(B) The times for complying with the requirements of Ordering Paragraph (C) and Ordering Paragraph (D)(2) in the order attached to Opinion No. 643-A are hereby extended for 30 days and 60 days respectively from the time for issuing this Opinion No. 643-B and order on rehearing.

(C) AP&L's filing of May 25, 1973, is rejected as a response to Arkla's application for rehearing filed May 10, 1973, and as an application for rehearing, but is accepted as an application for reconsideration of Opinion No. 643-A, and as a comment on Arkla's tariff filing of March 7, 1973. As an application for reconsideration, AP&L's filing is denied.

By the Commission

(SEAL)

KENNETH F. PLUMB,
Secretary.

APPENDIX F

The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part:

Section 4:

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make

such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that

any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7:

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas

to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, sub-

ject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

FILED
DEC 19 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-737

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT GENERAL MOTORS CORPORATION IN OPPOSITION

EDWARD J. GRENIER, JR.
RICHARD P. NOLAND
RICHARD J. PIERCE, JR.
ROBERT W. CLARK III

SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for General Motors Corporation

Of Counsel:

FRAZER F. HILDER
General Counsel

WILLIAM A. VAUGHAN
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

December 19, 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

QUESTION PRESENTED 2

STATEMENT OF THE CASE 2

ARGUMENT 5

I. The Question Presented Is Not an Important One 5

II. The Decision Below Is Correct 6

A. The Supreme Court Has Held That the Commission Retains Authority Under Section 4 of the Natural Gas Act to Implement Curtailments In a Manner Inconsistent with the Terms of Contracts Subject to Its Jurisdiction 7

B. The Courts Have Uniformly Held That The Commission Need Not Proceed Under Section 7 Of the Natural Gas Act When Implementing Curtailments 9

CONCLUSION 10

TABLE OF AUTHORITIES

COURT CASES:

American Smelting and Refining Co. v. *FPC*, 494 F.2d 925 (D.C. Cir.), *cert. denied, sub nom, Southern California Gas Co.* v. *FPC*, 419 U.S. 882 (1974) .. 8-9

Atlanta Gas Light Co. v. *FPC*, 476 F.2d 142 (5th Cir. 1973) 8, 9

Consolidated Edison Co. v. *FPC*, 494 F.2d 1140 (D.C. Cir. 1974) 8, 9

FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972) 7-10

FPC v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) 9

State of Louisiana v. *FPC*, 503 F.2d 844 (5th Cir. 1974) .8, 9

United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) 8

STATUTES:

Natural Gas Act

Section 4, 15 U.S.C. § 717(c) (1970) ..... *passim*

Section 7, 15 U.S.C. § 717(f) (1970) 9-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-737

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENT GENERAL MOTORS CORPORATION IN OPPOSITION

Respondent, General Motors Corporation ("General Motors"), through its Counsel, hereby files its Brief in Opposition to the petition for a writ of certiorari filed before this Court by Arkansas Louisiana Gas Company ("Arkla"), to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on August 21, 1975, in *Arkansas Power & Light Co., et al.* v. *FPC*, 517 F.2d 1223.

QUESTION PRESENTED

Did the Federal Power Commission exceed its authority under Section 4 of the Natural Gas Act by ordering an interstate pipeline to place into effect a plan for the curtailment of natural gas service which might at some time in the future require the pipeline to provide service to one of its customers in a manner inconsistent with the provisions of its contract with that customer?

STATEMENT OF THE CASE

General Motors accepts the Statement set forth by the Petitioner, with the following additions. In Opinion No. 643, the Commission stated that the curtailment plan devised for Arkla is based upon *end use* rather than upon *contract terms.* (Opinion 643, Appendix C at 48a).[1] That is, the Commission sought to curtail gas service to customers of Arkla on the basis of the actual use they make of the gas rather than the terms of their gas purchase contracts. The Commission explained that it felt "impelled" to do so:

> "because contracts do not necessarily serve the public interest requirement of efficient allocation of this wasting resource. In time of shortage, performance of a *firm* contract to deliver gas for an *inferior use,* at the expense of reduced deliveries [under an *interruptible* contract] for *priority uses,* is not compatible with consumer protection." (Opinion 643, Appendix C at 48a) (Emphasis added).

Thus, although contract terms are incorporated in the Commission's curtailment plan so that most "interruptible" contracts are to be curtailed prior to curtail-

---

[1] References are to the Appendices to the Petition.

ing most "firm" contracts, some "interruptible" requirements are classified in a priority equal to or higher than some "firm" requirements on the basis of end use.[2] In addition, the Commission established procedures to assure that any customer of Arkla may obtain an exemption from curtailment if it can prove that irreparable injury to life or property may occur because of unusual or special circumstances. (Opinion 643, Appendix C at 48a, 50a).

Although the unusual contract under which Arkla provided service to Mississippi River Transmission Corporation ("MRT") contained language which made Arkla's service to MRT uniquely inferior to all other service on the Arkla system, the Commission held that MRT might seek relief from curtailment by Arkla through the exemption procedure. (Opinion 643, Appendix C at 42a). The Commission did not classify MRT in a particular category of Arkla's curtailment plan. Thus, the Commission did not order Arkla to deliver any particular volume of gas to MRT, but only left open the possibility that it might order Arkla to do so in a future proceeding. Such a proceeding is now under way. On August 26, 1974, an Administrative Law Judge denied MRT's request that Arkla be required to deliver gas to MRT on the basis of the end-use requirements of MRT's customers, and this initial decision is now pending review by the Commission.[3]

---

[2] The curtailment plan eventually adopted by the Commission is set out at pages 63a-64a of Appendix D to the Petition. Of course, certain aspects of the curtailment plan, including its reliance upon contract terms, were reversed by the Court of Appeals.

[3] *See* Arkansas Louisiana Gas Co., Docket Nos. RP71-122, RP74-94-1, Initial Decision (Aug. 26, 1974), mimeo at 10-11.

Thus, contrary to Arkla's contention that the orders which are the subject of the Petition "require" Arkla "to deliver natural gas to MRT on the basis of the end uses of gas by MRT's customers" (Petition, p. 7), MRT is not now receiving, and has never received, any gas from Arkla as a result of those orders. Indeed, in the subsequent proceedings at the Federal Power Commission, Arkla has taken the position that the Commission orders at issue herein merely provided that Arkla might be required to make deliveries to MRT if, and only if, a finding is made by the Commission in the future that Arkla's failure to make such deliveries will result in irreparable injury to life or property.[4]

---

[4] Thus, on page 16 of its July 26, 1974, Brief to the Administrative Law Judge, Arkla describes the Commission's orders in the following manner:

> "In Opinion Nos. 643 and 643A the Commission made it clear that an interruptible customer, such as MRT, might take appropriate action under the provisions of Paragraph 49 of Opinion No. 643 to procure an exception *where irreparable injury to life or property might occur* because of unusual or special circumstances, to insure that high priority end uses presently served on an interruptible basis are properly protected (Opinion No. 643, paragraphs 29 and 45, mimeo. ed., pp. 11, 17; Opinion No. 643A, paragraph 10, mimeo. ed., p. 4)." (Emphasis in original).

Although General Motors believes that Opinion No. 643B obligated Arkla to make deliveries to MRT based upon the end uses on the MRT system, Arkla continues to dispute this contention, and an Administrative Law Judge has initially decided the issue in favor of Arkla's interpretation. The Commission has not yet resolved the continuing dispute between Arkla and MRT and General Motors concerning the obligation, if any, imposed by the Commission on Arkla to make deliveries to MRT.

ARGUMENT

I. The Question Presented Is Not an Important One.

The question presented by the petition is unique, narrow and does not warrant review by this Court. Petitioner contests the scope of the Commission's authority over the unique terms of a contract of sale between itself and a single customer, MRT. The petition does not raise the broad issue of whether the Commission possesses the general authority to implement curtailments in a manner inconsistent with the terms of contracts; nor does it raise the narrower issue of whether the Commission may modify the terms and conditions of all "interruptible" gas sales contracts in order to implement curtailments based upon end use.[5] It raises instead the extremely narrow issue of whether the Commission may order curtailment of gas service in a manner inconsistent with the terms of one particular "interruptible" contract in the context of a pipeline whose operations "differ markedly from those of the typical natural gas pipeline company regulated by the Commission under the Natural Gas Act." (Petition, p. 3).

Moreover, the precise question presented herein is not whether a customer such as MRT deserves to be placed in a particular curtailment priority or deserves to receive a particular quantity of natural gas, but, rather, whether the Commission has authority to leave

---

[5] The Court of Appeals not only rejected Arkla's position with regard to MRT, but also reached the more fundamental conclusion that a curtailment plan which retained any distinction based on contract terms was inconsistent with the Commission's end use policy and was not supported by substantial evidence. (517 F.2d at 1233-1236; Appendix A at 17a-22a). Arkla has not chosen to petition for review of this more general holding.

open the possibility that Arkla may be required at some future time to provide gas service to MRT in a manner inconsistent with the terms of MRT's contract with Arkla. The circumstances in which Arkla might be required to provide such service to MRT and the amount of such service that may be required have not yet been determined by the Commission. These issues are now pending Commission decision in a related proceeding. Thus, the extent of Arkla's disagreement with the Commission cannot even be determined in the present procedural posture of the case. Until the Commission takes further action, this Court cannot determine the nature of the obligation to deliver gas that the Commission will impose, the manner in which this action will alter Arkla's existing obligation under its contract with MRT, or the basis for the Commission's action modifying that obligation.

II. The Decision Below Is Correct.

Assuming for purposes of argument that the issue raised by Arkla has been sufficiently focused to permit consideration of its merits by this Court, General Motors respectfully submits that the resolution of this issue by the United States Court of Appeals for the District of Columbia Circuit is manifestly correct. Moreover, that decision is totally consistent with the decisions of this Court, other decisions of the United States Court of Appeals for the District of Columbia Circuit and the decisions of other United States Courts of Appeals.

A. The Supreme Court Has Held That the Commission Retains Authority Under Section 4 of the Natural Gas Act to Implement Curtailments in a Manner Inconsistent With the Terms of Contracts Subject to Its Jurisdiction.

Arkla contends that the Court of Appeals erred in holding that the Commission has the power to require Arkla to implement curtailments in a manner inconsistent with the provisions of its contract with MRT, but Arkla does not allege that the decision of the Court of Appeals stands alone in this respect. Indeed, Arkla argues that several recent Court of Appeals decisions holding that the Commission may act under Section 4 of the Natural Gas Act to require curtailment in a manner inconsistent with contractual terms are erroneous. (Petition, pp. 9-11). Arkla does not cite a contrary holding by any court, and contends only that this issue has never been resolved by the Supreme Court. Arkla argues that "no question of the scope of the Commission's authority under Section 4 was before this Court in [*FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972)]." (Petition, p. 10).[6]

Contrary to Arkla's claim, in *Louisiana Power* this Court held that the FPC has the authority under Sec-

---

[6] A related argument raised by Petitioner is without foundation. Arkla argues that the Commission technically never acted under Section 4(b) in this case because it did not find an "unreasonable difference" in service as required by that section. But the Commission clearly held that "a curtailment plan which would prevent MRT from receiving any gas, even for residential service, while boiler fuel users receive gas is *discriminatory and unjust and unreasonable.*" (Opinion 643A, Appendix D at 59a) (emphasis added). Arkla's contention that MRT is not entitled to any gas service from Arkla would have precisely the result found unlawful by the Commission because MRT would not receive gas from Arkla for any end use.

tion 4 of the Natural Gas Act to order curtailments of gas service in a manner inconsistent with the terms of contracts subject to its jurisdiction. In *Louisiana Power,* the Court was faced with the argument that the Commission acted unlawfully when it permitted a pipeline's new curtailment plan to take effect "despite contrary terms in existing contracts * * *." (406 U.S. at 646). The Court rejected this argument summarily, distinguishing *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation,* 350 U.S. 332 (1956), and quoting with approval the following passage from *United:*

> "Denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." (406 U.S. at 646).

This view subsequently has been followed consistently by the Courts of Appeals.[7] As the United States Court of Appeals for the District of Columbia Circuit said when presented with the argument that the Commission could not require a pipeline to curtail service in a manner inconsistent with the provisions of various contracts reflecting differing degrees of interruptibility:

> "A short answer to this argument is that the Commission is not bound by agreements among parties subject to its jurisdiction." *American*

---

[7] Atlanta Gas Light Co. v. FPC, 476 F.2d 142, 148 (5th Cir. 1973); American Smelting & Refining Co. v. FPC, 494 F.2d 925, 934 (D.C. Cir.), *cert. denied, sub nom.,* Southern California Gas Company v. FPC, 419 U.S. 882 (1974); Michigan Power Co. v. FPC, 494 F.2d 1140, 1144 (D.C. Cir. 1974); State of Louisiana v. FPC, 503 F.2d 844, 858 (5th Cir. 1974); Consolidated Edison Co. v. FPC, 512 F.2d 1332, 1347 n.88 (D.C. Cir. 1975).

Smelting and Refining Co. v. *FPC*, 494 F.2d 925, 934 (D.C. Cir.), *cert. denied, sub nom, Southern California Gas Company* v. *FPC*, 419 U.S. 882 (1974).

B. The Courts Have Uniformly Held That the Commission Need Not Proceed Under Section 7 of the Natural Gas Act When Implementing Curtailments.

Arkla contends that "the scope of the Commission's authority under Section 4 in a curtailment proceeding must be reconciled with the limitations of Section 7." (Petition, p. 12). However, Arkla does not refer the Court to any case holding that the Commission is limited by Section 7 standards when implementing curtailments. Indeed, there can be no such case in view of this Court's clear and unequivocal holding in *Louisiana Power* that the "substantive standard governing FPC evaluation of curtailment plans is found in § 4(b) of the Act." (406 U.S. at 642).[8] In *Louisiana Power*, this Court explicitly rejected Arkla's argument (Petition, pp. 12-13) that the Commission may exercise only a "veto power" over the actions of a pipeline in curtailment cases. Distinguishing *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961), cited by Arkla, the Court held:

> "*Transcontinental* dealt only with FPC 'veto power' under § 7, and in no way limited FPC authority under § 4(b) to prevent discrimination among a pipeline's customers. Since § 4(b) deals with 'service,' the FPC may invoke it to deal with curtailment programs whether or not it could also invoke § 7 for that purpose." (406 U.S. at 646).

---

[8] As in the case of Arkla's contract argument, the Courts of Appeals have uniformly followed this Court's holding in *Louisiana Power* that the substantive standards for acting in the curtailment area are those found in Section 4(b) of the Natural Gas Act. See cases cited in note 7, *supra*.

POOR COPY

Whatever option Arkla might have had and foregone under Section 7 at the time the Commission originally granted the certificate under which service to MRT was authorized is irrelevant to the power of the Commission to modify the terms and conditions of that service under Section 4. If the Commission could not make such modifications under Section 4, its only option would be to act on curtailment programs under Section 7—a rigid limitation of the Commission's powers in the curtailment context which was explicitly rejected by this Court in *Louisiana Power*. In short, the decision below was manifestly correct, and review is not required.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent, General Motors Corporation, respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. GRENIER, JR.
RICHARD P. NOLAND
RICHARD J. PIERCE, JR.
ROBERT W. CLARK III

SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for
General Motors Corporation

Of Counsel:

FRAZER F. HILDER
General Counsel

WILLIAM A. VAUGHAN
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

December 19, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-737

ARKANSAS LOUISIANA GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

Petitioner, a natural gas pipeline company, challenges one aspect of Federal Power Commission orders prescribing a plan for the curtailment of gas deliveries to petitioner's customers during periods of anticipated supply shortages.

The plan establishes a schedule of allocation priorities (Pet. App. 63a-64a) based principally upon the "end use" of the gas to be delivered—*i.e.*, the use to be made of the gas by its ultimate consumer. The Commission stated (*id.* at 48a):

> We are impelled to direct curtailment on the basis of end use rather than on the basis of contract simply because contracts do not necessarily serve the public interest requirement of efficient allocation of this wasting resource. In time of shortage, performance of

> a firm contract to deliver gas for an inferior use, at the expense of reduced deliveries for priority uses, is not compatible with consumer protection.

Most of petitioner's sales are made directly to industrial customers. Sales for resale are made only to a few customers, one of which is Mississippi River Transmission Corporation (MRT) (*id.* at 31a). Petitioner's contract with MRT provides that petitioner will deliver "such gas as seller is agreeable to selling and buyer is agreeable to buying" (*id.* at 40a). While "not here determining the amount of gas to be delivered to MRT and in what priority categories," the Commission determined that, notwithstanding the form of the contract, "the gas to be delivered to MRT will be measured by the end uses of the gas by MRT's customers as applied to the schedule of priorities" (*id.* at 71a). The Commission stated (*id.* at 59a):

> While [petitioner's] contract with MRT provides for interruptible service, a curtailment plan which would prevent MRT from receiving any gas, even for residential service, while the boiler fuel users receive gas is discriminatory and unjust and unreasonable. * * * [W]e must look beyond the contracts between [petitioner] and its customers to the end-use of gas.

The court of appeals set aside portions of the Commission's orders (Pet. App. 27a), but it upheld the Commission's determination to base curtailment priorities on the end use of the gas, notwithstanding any contrary provisions of petitioner's contracts with its customers generally and with MRT in particular (*id.* at 12a-17a).

Petitioner's only contention here is that the Commission lacks authority to give gas allocation priority to MRT, because that would require overriding the "seller's option" terms of petitioner's contract with MRT. That contention is answered by this Court's decision in *Federal*

Power Commission v. *Louisiana Power & Light Co.*, 406 U.S. 621. The Court there ruled that the Commission "may order pipelines facing shortages to develop and submit rational curtailment arrangements" and may permit "the pipeline's tariff amendments to take effect despite contrary terms in existing contracts" (406 U.S. at 646). "[T]he Commission is not bound by agreements among parties subject to its jurisdiction" when the resulting classification would be unjust, unreasonable, or unduly discriminatory. *American Smelting and Refining Co.* v. *Federal Power Commission*, 494 F. 2d 925, 934 (C.A. D.C.), certiorari denied *sub nom. Southern California Gas Co.* v. *Federal Power Commission*, 419 U.S. 882.

As the court of appeals correctly held in the present case, the Commission "found that a plan preventing MRT from getting any gas would be 'discriminatory and unjust and unreasonable', and the Commission is therefore entitled to prescribe alternative arrangements" (Pet. App. 17a). It "is not *required* to place interruptible users such as MRT in lower categories than firm users" (*ibid.*; emphasis in original).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DREXEL D. JOURNEY,
General Counsel,
Federal Power Commission.

FEBRUARY 1976.

DOJ-1976-02